TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 114.

JOHN W. BRAZEE, APPELLANT,

vs.

NICHOLAS SCHOFIELD AND MARY SCHOFIELD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED OCTOBER 16, 1884.

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INDEX.

	Original.	Print.
Transcript from district court	1	1
Amended complaint	1	1
Amended answer	5	2
Demurrer to amended answer	35	12
Order on demurrer	36	12
Reply	37	12
Hearing	55	18
Submission	56	18
Order as to evidence	57	19
Opinion	58	19
Finding	64	21
Decree	76	24
Notices of appeal	78	24
Bond	86	27
Hearing	88	28
Submission	89	28
Opinion	90	28
Judgment	105	33
Interrogatories to John W. Brazee	107	33
Deposition of John W. Brazee	111	34
Prayer of appeal	115	36
Citation	117	36
Bond	119	37
Clerk's certificate	122	38
Cost bill	124	38

JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 3, 1887.

1 TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver, for the April Term, 1882.

JOHN W. BRAZEE, Plaintiff,

vs.

NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

And now comes the plaintiff herein and for cause of action alleges that he is the owner in fee of the land and premises described in this his amended complaint, being a strip of land eighteen rods in width lying on and being a part of the west half of donation claim No. 51, in Clarke county, Washington Territory, assigned by the register and receiver of the U. S. land office to Amos M. Short, deceased; said strip of land is described as follows, to wit: Beginning at a point 27 chains east of the northwest corner of said donation land claim, thence south to the Columbia river 76.45 chains; thence south 61° east 5.25 chains; thence north 79.17 chains;
2 thence west to the place of beginning, containing thirty-five acres, more or less.

2. Plaintiff alleges that he is entitled to the possession of said land; that defendants are now and have been in possession of said land for the last six years, receiving the rents and profits thereof, and wrongfully withholds the possession of the same from the plaintiff, to his damage in the sum of five hundred dollars.

Wherefore plaintiff prays judgment against the defendants, that this plaintiff be adjudged to be the owner in fee of said land; that he be decreed the immediate possession thereof, and that defendants pay the plaintiff the said sum of five hundred dollars for the use and detention of said property, and that defendants pay the costs and disbursements of this action.

LEANDER HOLMES,
Plaintiff's Attorney.

3 TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

I, Leander Holmes, being sworn, say that I am the attorney for the plaintiff in the above-entitled action and know the contents of the above amended complaint, and believe the same to be true, and that the reason why I make this verification is because the plaintiff resides in the State of Oregon, and is not within the county of Clarke, Washington Territory, and therefore cannot verify the same.

LEANDER HOLMES.

Subscribed and sworn to before me this the 3rd day of April, 1882.
G. T. McCONNELL, *Clerk.*

4 [Endorsed:] In the district court of the 2nd judicial district of Washington Territory, holding terms at Vancouver. April term, 1882. John W. Brazee, plaintiff, *vs.* Nicholas Schofield and Mary Schofield, defendants. Amended complaint. Filed April 4th, 1882. G. T. McConnell, clerk.
1—114

5 *Amended Answer.*

TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver. April Term, 1882.

JOHN W. BRAZEE, Plaintiff,
vs.
NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

Leave of court being first had, defendants, for amended answer to the amended complaint of plaintiff in the above-entitled action, deny that plaintiff owns in fee or otherwise the land and premises, or any part thereof, described in his said amended complaint as being a strip of land eighteen rods in width, lying and being a part of the west half of donation claim No. 51, in Clarke county, Washington Territory, assigned by the register and receiver of the U. S. land office to Amos M. Short, deceased.

Said strip of land is described as follows, to wit: Beginning
6 at a point 27 chains east of the southwest corner of said donation claim, thence south to the Columbia river 76.45 chains; thence south 61° east 5.25 chains; thence north 79.17 chains; thence west to the place of beginning, containing thirty-five acres, more or less. And deny that plaintiff is the owner of any part or portion of the land described in his said amended complaint.

Defendants deny that plaintiff is entitled to the possession of said land or any portion or part or interest in said parcel of land or premises in his said amended complaint described; deny that defendants or either of them wrongfully withhold or has withheld the possession of any part of or interest in said premises from the plaintiff, either to his damage in the sum of five hundred dollars or any other sum or otherwise.

And defendants deny that either before or at or since the time of the commencement of this action plaintiff was entitled or is now entitled to the possession or right of possession of any interest in said premises or any part of said premises, and deny that said plaintiff has any right in or to any part thereof.

7 And for further and separate answer and defense to plaintiff's said amended complaint defendants allege that for a long time prior to and at the time of the commencement of this action the defendants were and ever since have been and now are the owners in fee and entitled to the possession of the whole of the said parcel of land and the premises in plaintiff's said amended complaint described.

I.

And for further and separate answer and defense to said amended complaint defendants allege that the only claim of title which plaintiff has or makes to any interest in or portion of the said parcel of land and premises in his said amended complaint described is

claimed and pretended by him to be derived through, under, and by virtue of certain deeds executed by Grant H. Short and others, the heirs-at-law of said Amos M. Short, deceased, to one Samuel R. Whipple in the years 1877 and 1878, and that at the date of the execution and delivery of each of said deeds and of all subsequent deeds under, by, or through which plaintiff claims title to any interest in said premises, these defendants were, and for a long
8 time prior to the date of each of said deeds had been, in the actual, open, visible, notorious, and exclusive possession of the whole of said premises under claim and color of title, in good faith claiming and holding the same adversely against all mankind, and that none of the grantors in any of said deeds was, at the time of the execution and delivery thereof, in possession of any part of the said premises, but that each and all of said grantors was, at the time of executing and delivering said deed and for a long time prior thereto had been, out of possession of the whole of said premises, and said deeds were and are each and all of them inoperative and void as against these defendants.

II.

And for a further separate answer and defense to said amended complaint these defendants allege that on or about the 29th day of April, A. D. 1865, the defendant, Nicholas Schofield, entered into the possession of the said premises in said amended complaint described under claim and colour of title in good faith, claiming to be the owner thereof in good faith by purchase and conveyance thereof to him for a valuable consideration by the appointed,
9 qualified, and acting guardian of Grant H. Short, one of the children and heirs-at-law of said Amos M. Short, and that defendants have ever since been in the adverse possession thereof, under claim and colour of title in good faith, and claiming in good faith to be the owners of said land, and that while so in possession thereof defendants have made, constructed, and caused to be erected and placed upon said land permanent improvements of the value of fifteen hundred dollars, out of which value defendants offer to offset an amount equal to any damage which upon the trial of this action may appear to have been sustained by plaintiff on account of any withholding of any part or interest in said premises from him by the defendants.

III.

And for a further separate answer and defense defendants allege that neither this plaintiff nor his ancestors, nor predecessors, nor his grantors, nor either of them, nor any person under whom he claims title to the land in controversy has been seized or possessed of the same or of any part thereof or of any interest or estate therein, within twenty years next before the commencement of this action, but that these defendants and those under whom they claim
10 have been continuously in the open, visible, notorious, exclusive adverse possession thereof, under claim and color of title in good faith, for more than twenty years next preceding the commencement of this action.

IV.

And for a further separate answer and defense to this action defendants allege that this plaintiff claims title to the land in controversy through and only through a deed to the same made and executed and delivered to him by his immediate grantors on the 1st day of March, A. D. 1882, long after the passage of the statute of Washington Territory was passed and approved and became a law poviding that actions for the recovery of real property or for the recovery of the possession thereof shall not be maintained for such recovery unless it appears that the plaintiff, his ancestors, predecessors, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action; and these defendants allege that neither this plaintiff nor his ancestors, predecessors, or grantor, nor any person through whom he
11 claims has been seized or possessed of said land or any part thereof, nor of any interest or estate therein within two years next before the commencement of this action, but that the defendants have been continuously in the open, visible, notorious, and adverse possession thereof, under claim and color of title in good faith, for more than ten years next before the commencement of this action.

V.

And for a further separate answer and defense these defendants allege that they claim title and right of possession to the land in dispute by reason of a purchase of the same at a guardian's sale had and made in Clarke county, Washington Territory, on or about the 20th day of April, A. D. 1865, by Curtis F. Short, guardian of the estate of Grant H. Short and of the said minor, that was duly authorized by an order duly made and entered of record by the probate court of Clarke county, Washington Territory, which said sale was duly confirmed by said probate court on the 29th day of April, 1865, and a
12 deed executed by said guardian on the said 29th day of April, 1865, made and executed by said guardian in pursuance of said order of confirmation by said probate court; that neither said order of sale nor said order of confirmation have been appealed from or vacated or reversed; that all these matters and facts were well known to plaintiff and his grantors, and these defendants therefore allege that said plaintiff ought not to have and maintain this action, because the same was not commenced within three years next after the sale of said real estate by said guardian or the confirmation of said sale that was so as aforesaid made by said probate court; and because neither said plaintiff nor any person through whom he claims title to said land commenced or prosecuted any action to recover said real estate or the possession thereof within three years next after the removal of any disability they may have been labouring under to sue for such recovery after such sale was made and confirmation thereof was had as aforesaid; and these defend-
13 ants plead in bar of said action sections 251 and 252 of an act entitled "An act defining the jurisdiction and practice in the probate courts of Washington Territory," passed January 16th, 1863, and other laws of Washington Territory now in force.

14 And for further separate answer and defense to plaintiff's said amended complaint, and addressing this defense to the honorable the judge of the district court of the second judicial district of Washington Territory and the presiding judge of this court in equity, defendants allege that on or about the 9th day of January, 1853, Amos M. Short died at Clark county aforesaid intestate, leaving him surviving Curtis F. Short, Druzilla Burlinghame, Samantha Morse, Alfred D. Short, Amos C. Short, Grant H. Short, Hannah E. Short, Maxey B. Short, Jerusha Shockley, and Matilda Lawrence, his only children and heirs-at-law, and Esther Short, his widow and the mother of said children.

That on the 8th day of March, 1848, said Amost M. Short and Esther, his wife, settled upon that certain tract of land known as claim No. 51, described in notification No. 275, in the office of the register and receiver at Vancouver, in said Clarke county, claiming the same as their donation land claim under the provisions of the seventh section of an act of Congress entitled "An act to
15 create the office of surveyor general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September 27th, 1850, and that the parcel of land described in said amended complaint is a part of the portion of said donation land claim of said Amos M. Short and wife alloted to the husband by the register and receiver; that thereafter said Amos M. Short and Esther Short continued to reside upon and cultivate said donation land claim from said 8th day of March, 1848, up to the time of the death of him, the said Amos M. Short, on said 9th day of January, 1853; that after the death of said Amos M. Short and on or about the 4th day of October, 1853, the said Esther Short caused to be filed in the office of the surveyor general at Oregon City, Oregon, the notification No. 275 aforesaid of said Amos M. Short and Esther Short upon said donation land claim, showing that said Amos M. Short was competent to take the same.

That on the 26th day of May, 1860, the map of the survey of public lands, including said donation land claim, was duly approved by the surveyor general, and on the 19th day of June, 1860, the
16 final proof of said settlement, residence upon, and cultivation of said donation land claim by said Amos M. Short and Esther Short was duly made and filed in the office of the register and receiver of the U. S. land office at Olympia, Washington Territory and on the 31st day of July, 1874, said donation certificate No. 275 was duly issued, in and by which the west half of said claim was assigned to said Amos M. Short and the east half thereof to his said wife, Esther, who died on or about the 28th day of June, 1862, and that a patent for said donation claim has been duly issued to said Amos M. Short and Esther Short and their heirs for said land, which said patent bears date October 13th, 1877, in and by which the west half of said land claim was alloted and granted to said Amos M. Short and *and* his heirs and the east half of said donation land claim is and was allotted and granted to said Esther Short and her heirs.

That on or about the 9th day of June, 1856, said Henry S. Burlingame, the husband of the said Druzilla Burlingame, was by the probate court of Clarke county, Washington Territory, duly appointed administrator of the estate of said Amos M. Short,
17 deceased, and then and there qualified and entered upon the discharge of the duties of his office as such administrator.

That in the month of April, 1836, Esther Short was duly appointed by the probate court of Clarke county, Washington Territory, guardian of the persons and estate of the minor heirs, Maxey B. Short, Grant H. Short, Matilda Short, and Hannah E. Short.

That J. P. Shockley, at said time and by said court, was duly appointed guardian of the persons and estate of Alfred D. Short, and thereupon the said Esther Short and J. P. Shockley duly qualified and entered upon the discharge of their respective duties as such guardians.

18 That on or about the 28th day of July, 1856, the said Samantha Morse and her husband, Henry E. Morse, Henry S. Burlingame, and Druzilla Burlingame, Jerusha Shockley, Amos E. Short, J. P. Shockley, as guardian of Alfred D. Short, and said Esther Short, as guardian of said Maxey B. Short, and Esther Short, as guardian of said Grant H. Short, and Esther Short, as guardian of said Hannah E. Short, and Esther Short, as guardian of said Matilda Short, now Matilda Lawrence, made and signed and presented to said probate court of Clarke county their petition in writing, setting forth that a final settlement of the accounts of said administrator of the estate of Amos M. Short had been made and had, and praying that a partition be made by said court of the real estate of said estate amongst said petitioners and said Curtis F. Short, who was at the time absent from said Territory of Washington; that upon the filing and presentation to said probate court of said petition one William Kelly was by said court appointed agent for said Curtis F. Short to represent his rights and interests in such partition of said
19 donation claim granted to said Amos M. Short among his heirs-at-law.

That thereupon Louis Van Vleet, David Parker, and Levi Douthit, three disinterested persons, were appointed by said probate court commissioners to appraise and divide said portion of said donation land claim allotted to said Amos M. Short among his said children and heirs-at-law, and said commissioners were sworn and duly qualified for the faithful discharge of the duties to which they were so appointed, and a warrant was issued to them by said probate court for that purpose.

That on the 14th day of August, 1856, the said commissioners made report to the said probate court that, after duly notifying each of said heirs or their agents, they had caused said land to be surveyed into ten parts of equal width east and west; that they then appraised said land claim and improvements at $4,900.00, making each heir's part $490.00.

That said ten parts into which said claim was so surveyed and divided were designated as lots, numbered from lot No. one on
20 the west side of said claim to lot No. 10 on the east side thereof, inclusive.

That lot No. 1, containing twenty-five acres one rood and two perches, valued at $500.00, was selected by Henry C. and Samantha Morse and was set apart to her.

That lot No. 2, containing 26 acres 2 roods and 37 perches, valued at $550.00, was selected by J. P. Shockley and his said wife, Jerusha Shockley, and was set apart to her.

That lot No. 3, containing 28 acres 2 roods and 24 perches, valued at $400.00, was selected by said Henry S. Burlingame and his wife, the said Druzilla Burlingame, and was set apart to her.

That lot No. 4, containing 30 acres 1 rood and 15 perches, valued at $1,500.00, was selected by said Amos C. Short (called in said commissioners' report Clark Short) and was set apart to him.

That lot No. 5, containing 31 acres 3 roods and 21 perches, valued at $400.00, was selected by Esther Short, as guardian for said Maxey B. Short, and was set apart to him.

That lot No. 6, containing 33 acres 1 rood and 4 perches, valued at $300,00, was selected by J. P. Shockley, as guardian of said Alfred D. Short, and was set apart —.

21 That lot No. 7, containing 34 acres 2 roods and ten perches, valued at $300.00, was selected by Esther Short, guardian of said Grant H. Short, and was set apart to him.

That lot No. 8, containing 35 acres 3 roods and 9 perches, valued at $250.00, was selected by said Esther Short, as guardian of said Matilda Lawrence, then Matilda Short, and was set apart to her, the said Matilda.

That lot No. 9, containing 36 acres 3 roods and 34 perches, valued at $300.00, was selected by said Esther Short, as guardian for said Hannah E. Short, and was set apart to her.

That lot No. 10, containing 37 acres 2 roods and 22 perches, valued at $400.00, was selected by said William Kelly, as agent for said Curtis F. Short, and was set apart to him.

That sums of money were paid by those of the said heirs whose allotments exceeded in value the sum of $490.00 to those of the said heirs whose allotment was valued at less than that amount in such sums as to make the said division and allotment equal and equitable.

That said report of said commissioners was accepted and approved by said probate court, and it was ordered and decreed by said

22 court that said partition be final and that each of said heirs should have in their own right the property set apart to them.

That before confirming said partition satisfactory evidence was produced to said probate court, showing that each of said heirs receiving a portion of said land of less value than other portions thereof had, as aforesaid and now here alleged, been satisfactorily paid or secured for such inequality in value of said portions.

That Henry E. Morse, husband of Samantha, his wife; J. P. Shockley, husband of Jerusha, his wife; Henry S. Burlinghame, husband of Druzilla, his wife, and A. J. Lawrence, husband of Matilda, his wife, are now living.

23 That on the 3rd day of February, 1864, the said Grant H. Short was a minor, under the age of twenty-one years, and

was the owner in fee of the said lot No. 7, which is the identical premises described in plaintiff's said amended complaint, and was then in possession thereof.

That on or about that said date Curtis F. Short, upon a petition duly made and presented to the said probate court of said Clarke county, Washington Territory, was duly appointed by said court guardian of said Grant H. Short and of his estate.

That at the time of said appointment of said Curtis F. Short as such guardian he duly qualified and entered upon his duties as such guardian.

That at the date last above mentioned said minor, Grant H.
24 Short, was indebted to different persons in considerable sums of money for actual necessaries to him furnished at his request.

That between the last-mentioned date and the 7th day of February, 1865, said minor was obliged to have still further money to pay for his necessary clothing, support, and maintenance, and was then indebted, therefore, in a still further and considerable amount of money, and that he was then in actual need of means for his necessary support and maintenance.

That he neither owned nor possessed any property wherewith to pay the said indebtedness except the said land now in controversy in this action, and that he had no other means wherewith to obtain the necessary supplies he was in need of.

That he was then nearly twenty years of age, and, with his full consent and approval, his said guardian, on or about said 7th day of February, 1865, made and presented his petition to said court in due form of law, shewing said facts and the other facts required by law, and praying said court to make an order to sell said real estate to raise money to meet said actual wants of said minor.

That said probate court thereupon duly made and entered upon its records an order fixing March 6th, 1865, for hearing said
25 petition and caused due and legal notice to be given to all persons interested of the time and place of hearing said petition.

That March 6th, 1865, due proof being first had that due notice of the time and place of the said hearing had been given under proofs offered, being heard for and against granting the prayer of said petition, the said court duly made and entered upon its records an order directing the sale of the said real estate of the said minor, Grant H. Short, by his said guardian, Curtis F. Short.

That thereupon due notice of the time, place, and conditions of such sale was given, as required by law, by said guardian, and that on or about the 24th day of April, 1865, in pursuance of said order of sale and said notice, said guardian duly sold the said land in controversy at public auction to the defendant, Nicholas Schofield, for the sum of $785.00 in U. S. gold coin, he being the highest and best bidder therefore and that being the highest sum bidden for the same.

That said purchase-money was paid to said guardian on the day of sale.

26 That on or about April 26th, 1865, said guardian made due return and report of said proceedings and sale to said court, and that on or about the 29th day of April, 1865, said probate court, after hearing and considering proofs establishing the regularity of said sale, duly made and entered upon its records an order confirming said sale and directing said guardian to make a good and sufficient deed of conveyance of said land to the said purchaser, Nicholas Schofield.

That thereafter, in pursuance of said order of confirmation of sale and directing said guardian to make said conveyance, said guardian did, on the 29th day of April, 1865, make, execute, and deliver a deed to the said land to the said purchaser, which said deed was duly recorded May 1st, 1865, in deed records of said Clarke county, Washington Territory; that said deed was made by said guardian and received by said defendant, Nicholas Schofield, in good faith at the time, believing it to be a good and sufficient deed in law to convey the title to said purchaser of the land therein described, which was the land belonging to said minor and ordered sold, and sold by said guardian, and the sale of — was as aforesaid confirmed by said court, and the identical tract of land in controversy;

27 but that the defendants in this action now learn that said deed was defective in this: That the scrivener who drew said deed by mistake omitted to insert therein and to set forth at large the original order authorizing and directing said sale of said real estate by said guardian as required by law then in force directing and providing what such deeds should recite and contain, and that said omission and defect in said deed creates a cloud upon these defendants' title to said premises, which is a great and continuing injury to them.

That all of said sum of $785.00, the said purchase price of said land so as aforesaid paid to said guardian, was by said guardian duly paid to his said ward and for his actual use and for actual necessaries required by him, all of which will more fully appear by the records and files of said probate court, which is hereby referred to and made a part of this answer.

That at no time since or before the commencement of this action has the plaintiff nor any person through whom he claims

28 title paid or offered to pay to these defendants the said purchase price for said premises, amounting to $785.00, or its interest, or any part of either.

That at the time of purchase of said premises by defendant, Nicholas Schofield, the same was wholly unimproved land, and the full cash value was paid for said land at the time of the purchase.

That immediately upon receiving said deed for said premises from said guardian these defendants in good faith took possession of said lands and commenced improving the same.

That they fenced it, erected buildings thereon, and have cleared the larger portion thereof and have paid taxes thereon, amounting annually to not less than $20 *dollars.*

That these improvements placed thereon, the taxes paid, and the purchase-money, counting legal interest thereon from the time of paying the same, would now amount to $5,000.00, or thereabouts.

That all these facts were known to the plaintiff and his
29 grantors as well now as at the times said money was expended and said improvements were made by these defendants.

That for more than eleven years next after said minor, Grant H. Short, became twenty-one years of age he daily witnessed the improvements these defendants were making upon said premises, and that during all this time he acquiesced in all the proceedings of the probate court and in all the said acts of his said guardian and in these defendants' title to the same and in their claim to the possession thereof as against all the world, and that he thereby and by retaining the said purchase-money, and in many other ways, fully ratified and confirmed all the said acts and proceedings by which these defendants acquired possession of said lands and their said claim to hold and own the same in their own right.

That said defendants were at the time of said guardian's sale, ever since have been, and now are husband and wife.

That defendant, Nicholas Schofield, on the 8th day of No-
30 vember, 1872, by deed conveyed all his title and interest to said premises to the defendant, Mary Schofield, and that on the same day said deed was duly recorded in deed records of said Clarke county.

That each of said children of said Amos M. Short so represented by guardian in said partition was, at the time thereof, a minor, but that each of them has long since attained the age of majority, and that each of said children of said Amos M. Short have, since said partition was made, and being of lawful age and competent
31 so to do, *have* for a valuable consideration, sold and conveyed to other persons the portions of land so allotted and assigned to them as hereinbefore stated, respectively, in and by said proceedings and decree of division and partition, and that the interests of said children, respectively, who were so under guardianship was sold by their said guardians by order of said probate court for their benefit, and the proceeds of such sale received by said guardians and used and appropriated for the support, maintenance, and education of said children during their minority.

That said Esther Short purchased in her lifetime one or more of said lots of land embraced in said partition, and sold portions of said lots as attorney-in-fact for one or more of said children and heirs of said Amos M. Short, and that each and all of said children and heirs-at-law of said Amos M. Short and his said widow, Esther Short, assented to, acquiesced in, and ratified and confirmed for many years before the commencement of this action, by many acts that appear by the public records of said Clarke county and by many other acts, said partition of Amos M. Short's part of said donation land claim amongst said children, as hereinbefore stated.

32 That since the purchase of the said land in the said amended complaint described by said defendant, Nicholas

Schofield, from said guardian of said minor, Grant H. Short, as aforesaid, defendants have erected and made and caused to be made and placed upon said land in good faith lasting and permanent improvements of the value of more than $1,500.00, and have ever since been in the adverse possession of said land, claiming to own and in good faith believing that they did own the same, and were so in possession at the time when plaintiff and those under whom he claims took and received the conveyances under which plaintiff claims title to said land, and the plaintiff and his said grantors, at the time of taking said conveyances, knew that defendants were in the actual, visible, notorious, and exclusive adverse possession of said land, and they had all full knowledge and notice of all the matters and things hereinbefore stated, and that plaintiff paid nothing for his pretended title to and interest in said premises in his said amended complaint described.

That defendants pray that this honorable court, as a court
33 of equity, may enquire into the matters and things in this separate answer and defense addressed to the judge of this court, and that if upon such enquiry the court shall find the allegations therein contained to be true, then and in that event that the plaintiff be decreed and declared to be estopped in equity from asserting said or any claim to said land or any interest therein; and that the deed of said guardian, Curtis F. Short, be reformed in the respect wherein it is defective, and that the title of the said defendant, Mary Schofield, thereto be forever quieted as against plaintiff and all persons claiming or to claim the same by, through, or under him; that said defendant, Mary Schofield, be decreed to be the equitable owner thereof and entitled to retain the possession of the same, and for such further and other relief as may be just and equitable; and that defendants recover their costs and disbursements in this action of the plaintiff.

FRANK CLARK AND
B. F. DENNISON,
Attorneys for Defendants.

34 TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

Nicholas Schofield, being duly sworn, on oath says he is one of the defendants in the above-entitled action; that he has heard the foregoing answer read and knows the contents thereof, and that he believes the same to be true; also that he verifies this answer as well for his codefendant as for himself.

NICHOLAS SCHOFIELD.

Subscribed and sworn to before me this 7th day of April, A. D. 1882.

FRANK CLARK,
Notary Public.

34½ [Endorsed:] No. —. John W. Brazee, plaintiff, *vs.* Nicholas and Mary Schofield, defendants. Amended answer. Filed April 7th, 1882. G. T. McConnell, clerk. Dennison & Clark, attorneys for defendants.

35 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver, for the Counties of Clarke and Skamania.

JOHN W. BRAZEE, Plaintiff,
vs.
NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

Now comes the plaintiff, by his attorneys, L. Holmes and Northrup and Gilbert, and demurs to the following portions of the amended answer of the defendants herein, to wit: To the first separate answer and defense, to the fourth separate answer and defense, to the sixth separate answer and defense, beginning on page 10 of said answer, for the reason that said separate answers and none of them contain or state matters sufficient to constitute a defense.

L. HOLMES,
NORTHRUP AND GILBERT,
Attorneys for Plaintiff.

35½ [Endorsed:] No. —. John W. Brazee, plaintiff, *vs.* Nicholas and Mary Schofield, defendants. Demurrer. Filed April 17th, 1882. G. T. McConnell, clerk. L. Holmes, Northrup & Gilbert, attorneys for plaintiff.

36 In the District Court of the Second Judicial District, Holding Terms at Vancouver.

JOHN W. BRAZEE, Plaintiff,
vs.
NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

This cause coming on to be heard upon demurrer to the amended answer, the said plaintiff appearing by W. B. Gilbert, of counsel, and defendants by Frank Clark, Esq., and B. F. Dennison, Esq., their attorneys, the said demurrer is waived as to the sixth separate defense in said answer, and as to the remainder thereof is overruled, by consent of parties. It is ordered that plaintiff have forty days in which to reply to said amended answer.

JOHN P. HOYT,
Judge of said Court.

[Endorsed:] Brazee *vs.* Schofield. Entered of record and filed April 29th, 1882. G. T. McConnell, clerk.

37 TERRITORY OF WASHINGTON, } *ss:*
County of Clarke, }

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver. April Term, 1882.

JOHN W. BRAZEE, Plaintiff,
vs.
NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

And now comes the plaintiff, John W. Brazee, and for reply to the separate answer and defense, as set out at the beginning of page

No. 3 of said amended answer, denies that these defendants for a long time prior to or at the time of the commencement of this action or ever since have been or now are the owners in fee or otherwise entitled to the possession of the whole of said parcel of land or any part thereof, or the premises in plaintiff's amended complaint described.

1st. And in reply to defendants' 1st separate answer and defense this plaintiff admits title is derived through, under, and by
38 virtue of certain deeds executed by Grant H. Short and others, the heirs-at-law of Amos M. Short, deceased, to one Samuel R. Whipple *et al.* in the years 1877 and 1878; but plaintiff denies that the alleged visible, notorious, and actual possession of said premises by said defendants was under claim or color of title or in good faith at the time of the execution of the deeds of the heirs-at-law as alleged, or before or since said time; denies that the alleged possession was adverse to the true owners at any time; denies that said open and visible possession has ever extended to the whole of said premises or any more than ½ thereof, and denies that said deeds were or are null or void as against said defendants.

2d. And in reply to defendants' second separate answer and defense this plaintiff denies that defendant, Nicholas Schofield, in April, 1865, entered into possession of said premises in plaintiff's amended complaint described under claim or colour of title or in good faith; denies that he became the purchase- thereof, as alleged, in good faith, and denies that defendants have ever since
39 been in the adverse possession thereof under claim or colour of title or in good faith, and denies that defendants could claim under color of title or in good faith to be the owners in fee or otherwise of said land, or that the possession thereof by the defendants could be or was adverse. This plaintiff, for further reply, denies said alleged guardian's sale was made by any authority, or that the probate judge from whom the decree of sale of said land was given had jurisdiction of the subject-matter or of any of the parties in interest; and denies that defendants have expended in improvements fifteen hundred dollars on said land, or that they are entitled to offset an amount equal to any damage that plaintiff may recover against the defendants for withholding the possession of the said premises from him.

And for reply to defendants' third separate answer and defense plaintiff denies that plaintiff's grantors or any person under whom he claims title to the land in controversy has not been seized or possessed of the same or any part of the same, or of any interest or estate therein within twenty years next before the commencement
40 of this action; and denies that said defendants or those under whom they claim have been continuously in the open or visible or notorious or exclusive possession of said land for 20 years or any period more than 17 years, and denies that said possession was adverse or under claim or color of title or in good faith, and denies that defendants have held said land under color of title for any period of time whatever, but avers that such possession was without title or color of title whatever.

4th. And for reply to the 4th separate answer and defense plaintiff denies that defendants have been in the adverse possession of said land under claim or color of title or in good faith for more than 10 years or any period of time.

41 And for reply to the fifth separate answer and defense the plaintiff denies that the alleged purchase of said lands by defendants in April, 1865, was duly or legally authorized by an order, or was duly or legally made or entered of record by the probate court of the county of Clarke, Washington Territory; denies that said sale was duly confirmed by said probate court on the 29th day of April, 1865, or at any time; denies that any legal or valid deed was made or executed by said guardian on said date or at any time in pursuance of said order or otherwise, and avers the fact to be that said pretended order of sale and alleged confirmation thereof and alleged guardian's deed were each and all wholly illegal and void, and that the said probate court had neither jurisdiction of the subject-matter of said proceedings or of the person of said minor or of any of the parties in interest, for the reason that said petition did not contain the requisite averments as required by law, and that said minor owned but an individual one-tenth interest in said land at the time said alleged proceedings were had; that no notice

42 was given of *of* said alleged petition to sell, nor was a copy of the order of the probate court to appear and shew cause why said land should not be sold served on said minor or any person interested, as required by law, nor was said order to all parties interested to appear and shew cause why said land should not be sold published as required by law.

And said alleged order of sale was made at chambers, and not at a regular term of said court, as required by law.

And denies that this plaintiff ought not to have or maintain this action because the same was not commenced within three years next after said pretended sale or such alleged confirmation thereof was had.

And denies that this plaintiff ought not to maintain this action because the same was not commenced within three years next after the removal of any disabilities they may have been laboring under.

43 And for reply to the sixth separate defense and the equitable defense of said defendants the plaintiff denies that said Esther Short was, in the month of April, 1856, or at any time, duly or legally appointed guardian of the person or estate of said Grant H. Short, and avers that said pretended and alleged appointment of said Esther Short as guardian of said minor was and is wholly illegal and void.

Denies that on the 28th day of July, 1856, or at any time, any legal petition was filed for partition of said real estate of the said Amos M. Short, deceased, or that said probate court duly or lawfully appointed said alleged appraisers to divide said donation claim of Amos M. Short among his said children or heirs-at-law; denies that any portion of said claim had at said date, or at any time before the year 1874, been allotted or set apart to said Amos M. Short;

denies that petition for partition set forth or contained the statement that a final settlement of the accounts of said administrator of the estate of said Amos M. Short had been had.

Denies that said Wm. Kelly was legally appointed agent
44 of said Curtis F. Short by said probate court, and avers that in said proceedings said probate court had no jurisdiction of the person of said Curtis F. Short and no authority to appoint such agent.

Denies that any warrant was ever issued to such appraisers by said probate court for the purpose of such appraisement or division, or for any purpose.

Denies that said commissioners ever notified said Curtis F. Short of their meetings or proceedings in said matter.

Denies that said report of such commissioners was duly or lawfully accepted or approved.

Denies that satisfactory evidence or any evidence was produced to said probate court showing that each of said heirs or any of said heirs receiving a portion of said land of less value than other portions thereof had been paid or secured for such inequality in value of said portions.

And this plaintiff alleges that the whole of said alleged proceedings for partition were wholly illegal and void, and that said court had no jurisdiction of the said subject-matter nor of the parties to said proceedings, and that no notice of said proceedings was
45 given as required by law, and no decree of partition was ever made or entered by said probate court as required by law; denies that on the 3rd day of February, 1864, or at any time, said Grant H. Short was the owner in fee or otherwise of said lot 7, or that he then or at any time ever owned any more than an undivided one-tenth interest in said land, and denies that he was then in possession of said tract other than as the owner of an undivided one-tenth of the same.

Denies that on said last-named date or at any time said Curtis F. Short was upon a petition or otherwise appointed by said court guardian of said Grant H. Short or of his estate.

Denies that said Curtis F. Short ever duly entered upon the discharge of the duties of such office, but avers that said alleged appointment was wholly illegal and void.

Denies that said debts of said minor were for actual necessaries to him furnished or at his request, and denies that said debts or any of them were legal debts or that his estate was chargeable with the same or any of them.

46 Denies that between said — and the 7th day of February, 1865, said minor was obliged to have still further money or any money to pay for his necessary clothing or support or maintenance, or was then or there indebted therefore in any amount of money; and denies that he was then in actual need of means for his support or maintenance, and avers the fact to be that at said date and for a long time prior thereto said minor was fully able to earn his own living, and that by far the greater part of said alleged debts were

claims for money alleged to be due for liquors and saloon bills of said minor and fictitious claims of a kindred nature.

Denies that said minor possessed no other property than said land, and avers the fact to be that he then had a valid claim of $343.00 against the estate of Esther Short, which estate was solvent.

Denies that said minor had no other means wherewith to obtain the necessary supplies needed by him, and alleges that said minor was in good health and strong and well able to earn wages more than sufficient for all his needs.

47 Denies that said petition of said Curtis F. Short shewed said facts as alleged in said answer or that said petition shewed other facts as required by law, and alleges that said petition shewed upon its face that said minor had said claim against said estate of said Esther Short, deceased, and that said alleged claims upon which and for the payment of which said land was sought to be sold were wholly illegal and void claims, and said petition showed that there was no legal or other necessity *or other necessity* for selling said land; that said petition contained no description of said tract in controversy nor any description of any land whatever.

Denies that said probate court duly made or entered upon its records an order fixing March 6th, 1865, or any date for hearing of said petition, and avers that said order was wholly void, for the reason that the court had no jurisdiction to make the same.

Denies that said court caused due or legal or any notice to be given to all or any persons interested of the time or place of hearing such petition or that any such notice was given whatever.

48 Denies that due proof or any proof was ever given or had that due or any notice of the time or place of said hearing had been had or given, and denies that any proofs were offered or heard for or against the granting of said petition.

Denies that said court duly made or entered upon its record an order directing the sale of said real estate, but avers that the said order of sale was wholly illegal and void, for the reason that said court had no jurisdiction to make the same, there having been no legal petition presented and no notice having been given of hearing therein, either to said minor or to any party or persons interested therein.

Denies that due notice of the time or place of such sale or the conditions thereof was given, as required by law, and avers that the only notice attempted to be given in said matter was a notice published in the ——, published at Olympia, in Thurston county, in said Territory; whereas at said time two weekly newspapers were regularly published in Vancouver, in said county of Clarke,

49 and of general circulation therein.

Denies that said guardian duly sold said land in controversy, and avers that said attempted sale was wholly illegal and void on account of the said defects in said proceedings as above set forth.

Denies that said court heard proof establishing the regularity of said sale or that said court duly made or entered upon its records

any order confirming said sale or directing said alleged guardian to make a deed of said land.

Denies that said deed was made by said alleged guardian or received by said Schofield in good faith, and denies that said Curtis F. Short believed the same to be a good or sufficient deed in law to convey title to said purchaser, and denies that said land belonged to said minor or that any more than an undivided one-tenth part thereof belonged to said minor.

Denies that said sum of $785 or any more than a small portion thereof was paid to said ward or for actual necessaries required by him.

Denies that the full cash value of said land was paid therefor, and alleges that at and prior to the said attempted sale, on the — day of ——, 1865, said land was fully worth the sum of two thousand dollars.

50

Denies that said defendants in good faith took possession of said land.

Denies that said improvements placed on said land, the taxes so paid, and the purchase-money, with interest thereon from the time of paying the same, now amount to $5,000.00 or any more than $2,000.

Denies that during said period of eleven years or any period said Grant H. Short daily witnessed such or any improvements of the defendants, and denies that, during said or any period, he acquiesced in the same; that he acquiesced in the claim of defendants to own said land or to the possession thereof, and denies that thereby or otherwise, or by retaining said or any purchase price or in any other way, he ratified or confirmed all or any of said acts or proceedings.

That as to whether or not all or any of the other children of Amos Short and Esther Short have, by guardian or otherwise, conveyed to other persons any portion of land, or allotted or attempted to be allotted to them or either of them, in such alleged partition this plaintiff has not knowledge or information sufficient wherewith to form a belief; that as to whether any such proceeds of any such guardian's sale were used or appropriated for the support or main*tai*nance of such children or either of them during minority the plaintiff has not knowledge or information sufficient to form a belief.

51

That as to whether or not all or any of said children or heirs of Amos M. Short or his said widow assented to or acquiesced to or acquiesced in or ratified or confirmed for many years or for any time or at all in any manner said partition or attempted partition this plaintiff has no knowledge or information sufficient to form a belief, and therefore denies the same.

Denies that defendants have made or caused to be made or placed upon said land in good faith or otherwise lasting or permanent improvements of the value of more than $1,500 or of any value whatever exceeding the sum of $500.

Denies that defendants have ever since or at any time been in the adverse possession of said land, or that in good faith they

claimed or could claim to own the same, and denies that
52 they were so in possession at the time when plaintiff or those under whom he claims took or received the conveyances or any of them under which plaintiff claims title to said land.

Denies that the plaintiff or his grantors or any of them at the time of taking such conveyances or at any time knew that defendants were in the notorious or exclusive or adverse possession of said land, or that they had knowledge of any of the matters or things stated in said answer, save and except as admitted by this reply; deny that plaintiff paid nothing for his title or interest in said land, but avers that he paid therefor the sum of $400, four hundred dollars.

Wherefore plaintiff demands judgment against the defendants as demanded in his amended complaint.

L. HOLMES,
Attorney for Plaintiff.

STATE OF OREGON, } ss:
County of Multonmah, }

53 I, Jno. W. Brazee, being duly sworn, say: I am the plaintiff above named, and think the foregoing reply is true, as I verily believe.

J. W. BRAZEE.

Subscribed and sworn to before me this 2d day of June, A. D. 1882.

[SEAL.] FRED. V. HOLMAN,
Commissioner of Deeds for Washington Territory.
Resident at Portland, Oregon.

54 [Endorsed:] John W. Brazee, plaintiff, *vs.* Nicholas and Mary Schofield. Reply to amended answer. Filed June 2nd, 1882. G. T. McConnell, clerk.

55 TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

In the District Court of the 2nd Judicial District of Washington Territory, Holding Terms at Vancouver.

JOHN W. BRAZEE, Plaintiff,

vs.

NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

Now, on this ninth day of November, 1882, this cause being called in its order, the plaintiff being represented by Messrs. Holmes, Gilbert and Williams, his counsel, and the defendants by Messrs. Clark and Dennison, their counsel, and said parties, plaintiff and defendants, by their respective counsel, waive a jury and consented that the court should hear and determine this cause, and upon motion and by consent of both plaintiff and defendant-, by their respective counsel, it is ordered by the court that John W. Cochran be, and he hereby is, appointed and sworn short-hand reporter in

this cause to take the evidence in short-hand, and, if required by either party or the court, to transcribe the same into full and
56 complete long hand; and it is further ordered by the court that said reporter shall be paid by said parties plaintiff and defendant equally in the first place and the same charged in the bill of costs to abide the event of this suit; and the court having heard all the evidence and allegations of the parties when court adjourned until to-morrow morning at nine o'clock.

And on Friday, November 10th, 1882, the following:

JOHN W. BRAZEE
vs.
NICHOLAS SCHOFIELD and MARY SCHOFIELD.

Now, on this 10th day of November, 1882, this cause comes on to be further heard, the parties plaintiff and defendant being represented as heretofore, and the court having heard part of the argument of counsel.

And on Saturday, November 11th, 1882, the following:

JOHN W. BRAZEE
vs.
MARY SCHOFIELD and NICHOLAS SCHOFIELD.

57 Now, on this eleventh day of November, 1882, the court, having heard all the evidence and allegations of the parties, the argument of counsel, takes the same under advisement, and it is agreed and stipulated in open court by and between the plaintiff and defendants, by their respective counsel, that the court may render decision and judgement and the same be entered in vacation to all intents and purposes as though made, rendered, and entered in term time.

JOHN P. HOYT, *Judge, &c.*

And on Wednesday, April 4th, 1883, the following:

JOHN W. BRAZEE
vs.
NICHOLAS SCHOFIELD and MARY SCHOFIELD.

On motion of counsel for defendants in this case, it is ordered that the evidence taken down in short-hand at the hearing be translated, and that the same be filed as part of the evidence in this case, and that the expense of translating be taxed with other costs, the same being in pursuance of the consent heretofore given in open court by counsel of the respective parties.

58 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver.

J. W. BRAZEE *vs.* NICHOLAS SCHOFIELD and MARY SCHOFIELD.

The only preliminary question in the case which has not been determined on demurrer to the pleadings therein is as to whether or

not the plaintiff, under the circumstances disclosed, is the party in interest, so as to authorize him to maintain this action, and as the conclusion to which I have come as to the merits of the controversy makes it unnecessary for me to decide said question in the suit I shall express no opinion in regard thereto. As to the merits of the case, I would say that I am of the opinion that the alleged proceedings in partition had in the probate court of Clarke county were void and of no effect as such, and that thereby the legal title
59 of the several tenants in common to an undivided interest in the whole tract of land sought to be partitioned was not divested, but that the said alleged proceedings were properly admitted in evidence as tending to show the existence of certain facts, in the light of which the acts of the said tenants in common should be viewed; and, interpreting the act of each and all of them in connection with the facts made to appear by said attempted partition proceedings I am of the opinion that they are each and all equitably estopped from asserting, as against each other, any title to any of said tract of land excepting the portion set apart and selected by each in the said attempted partition proceedings. This, as it seems to me, would have been the case beyond queston had the title of said tenants in common been perfect and they all of full age at the time when said proceedings were had; but the fact that at such time many of the co-tenants were minors, and that their title thereto was indefinite and prospective, *is*, of course, circumstances which
60 initiate somewhat against such estoppel, but in view of the fact that a long time elapsed after all of said minors had become of age, and several years after the title of said co-tenants to said tract had been perfected, before the deed- under which plaintiff claims were made, and that the making of said deeds were the first acts upon the part of any of said co-tenants tending to show a want of acquiesence in said partition proceedings, I think that it was then too late for them to be allowed thus to set aside rights which had been acquired and possessed by virtue of their former acts in affirmance of the said partion of said tract of land.

It follows, from what has been said, that if plaintiff can assert any title to the land in question in this action it is that derived from Grant H. Short, the heir to whom this parcel was set apart in said attempted partition proceedings, and I am of the opinion that
61 he cannot assert any title thus derived as against these defendants, for while it is probable that the sale of said land at guardian's sale was void and insufficient to divest the legal title, yet the fact that at the time such sale was made the said Grant H. Short was almost twenty-one years of age; that he was present at such sale and actively engaged in inducing bids therefor; that the full value of said land was realized at such sale and applied to the benefit of such minor; that more than eleven years elapsed after he became of age without his doing anything to show any dissatisfaction with such sale, during all of which time he was enjoying the proceeds thereof and knowingly allowing the purchaser to make costly improvements on said land without any objection on his part, — placed him in such a position that at the time he made the deed under

which plaintiff claims a court of equity would not allow him to assert his title as against the defendants or those claiming
62 under them. It follows, from what has been said, that though the legal title to the land in controvery is in the plaintiff, yet a court of equity will not allow it to be enforced as against the defendants, and that there must be a judgement in their favor.

Let findings and a decree be prepared and submitted.

Olympia, March 8th, 1883.

JOHN P. HOYT,
Judge of said Court.

63 [Endorsed:] District court at Vancouver. John W. Brazee *vs.* Nicholas Schofield *et al.* Opinion. Filed March 9th, 1883. G. T. McConnell, clerk.

64 1. Was Grant H. Short and the other heirs-at-law of Amos M. Short, each and all of them, out of possession of the land in controversy at the time they executed and delivered their deeds to Samuel R. Whipple in 1877 and 1878?

Yes.

2. At the time said deeds were executed and delivered to Samuel R. Whipple were the defendants or either of them in the exclusive and adverse possession of said land?

Yes.

3. In what year did Grant H. Short become twenty-one years of age?

In 1866.

65 4. Was the defendant, Nicholas Schofield, continuously in the exclusive and adverse possession of the lands in controversy from April, 1865, until he conveyed the same to the defendant, Mary Schofield, in November, 1872?

Yes.

5. Has the defendant, Mary Schofield, been continuously in the exclusive and adverse possession of said lands since November, 1872, until the present time?

Yes.

6. Was Grant H. Short in the exclusive and adverse possession of the land in controversy by guardian from the time of the alleged partition, in 1856, until the sale thereof by his guardian, in 1865?

Proof does not show.

66 7. Was the alleged guardian's sale of the land in controversy made for the purpose of paying "the just debts" of Grant H. Short and of furnishing him with "necessaries?"

Yes.

8. Was Grant H. Short or any person claiming under him at any time returned or offered to return any part of the purchase-money paid by Nicholas Schofield to the guardian of Grant H. Short for the land in controversy?

No.

9. Has Grant H. Short, since coming of age or at any time, done any act indicating his intention to disa-firm the sale or deed made

by his guardian in 1865 to Nicholas Schofield, other then making the deed to Samuel R. Whipple, dated March 16, 1878?

No.

67 10. What is the value of the improvements put upon the land in controversy by the defendants since April, 1865?

"$2,000.00."

11. What amount of taxes have the defendants paid on said land since April, 1865?

"Twenty dollars each year."

12. What was the value of the land in controversy in 1865?

$800.00, gold.

Also its present value?

$7,000.00.

13. Have any of the heirs-at-law of Amos M. Short done any act at any time indicating his or her intention to disaffirm or not be bound by the alleged partition made in 1856, other than making their deeds to Samuel R. Whipple in 1877 and 1878?

"No."

68 14. From the time said partition was made, in 1856, until the making of their deeds to Samuel R. Whipple, in 1877 and 1878, have each and all of said heirs acquiesced in said partition as made, and held and claimed in severalty the portions allotted to them according to said partition?

"Yes."

15. How much of the $785 paid by Schofield for the lands purchased at the guardian's sale in 1865 was applied to the payment of the just debts of the minor, Grant H. Short, and for his support and maintainance.

"The whole."

69 16. Was — paid or secured to the several heirs entitled thereto for the purpose of equalizing the partition as made in 1865?

"Yes."

17. In what year did Esther Short die?

About 1862.

18. Did the heirs who were minors in 1856, after becoming of full age, adopt the partition as made and assented to by their guardians in 1856?

"Yes."

19. Had Grant H. Short, before and after attaining his majority, notice of the proceedings in the probate court affecting his real estate?

"Yes."

70 20. Has Grant H. Short known all along since 1865 that Schofield was in possession of the land in controversy, cultivating and improving the same?

"Yes."

21. Were the proceeds of the guardian's sale applied to the use and benefit of Grant H. Short?

"Yes."

22. Were the proceedings in partition, report of commissioners, survey, and plat recorded in auditor's office of Clarke county in October, 1856?

"Yes."

22. Has the plaintiff "a valid subsisting interest" in the land in controversy, within the meaning of section 536 of the code?

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71 1. Did Henry E. Morse and Samantha, his wife, in 1857 sell and convey to David Parker the lot of land designated in the alleged partition proceedings in 1856 as lot 1? ("No. 1.")

"Yes."

2. Did S. P. Shockley and Jerusha, his wife, in 1858 sell and convey to Esther Short the lot of land designated in said partition proceedings as lot 2?" ("No. 2.")

"Yes."

72 3. Did Henry S. Burlingame and Druzilla, his wife, in 1865, sell and convey to Samuel N. Whipple the lot of land designated in said partition proceedings as lot 3? ("No. 3.")

"Yes."

4. Did Amos E. Short and wife, in 1859, sell and convey to Leander Holmes the lot of land designated in said partition proceedings as lot 4? ("No. 4.")

"Yes."

5. Did Maxey B. Short, in 1869, sell and convey to William Ranck and wife the lot of land designated in said partition proceedings as lot 5? ("No. 5.")

"Yes."

6. Did Alfred D. Short, in 1864, sell and convey to Julius Suiste the lot of land designated in said partition proceedings as lot 6? ("No. 6.")

"Yes."

73 7. Did Grant H. Short and wife and Curtis F. Short, as guardian of Grant H. Short, in 1864, mortgage to Geo. Beatty for $200 the lot of land designated in said partition proceedings as lot 7? ("No. 7.")

"Yes."

8. Did Curtis F. Short, as guardian of Grant H. Short, in 1865, sell and convey to Nicholas Schofield the lot of land designated in said partition proceedings as lot 7? ("7.")

"Yes."

9. Did Andrew J. Lawrence and his wife, Matilda, in 1867, sell and convey to Guy Hayden the lot of land designated in said partition proceedings as lot 8? ("No. 8.")

"Yes."

74 10. Did Hannah E. Short, in 1869, sell and convey to James E. Wyche the lot of land designated in said partition proceedings as lot 9? ("No. 9.")

"Yes."

11. Did Esther Short, acting under a power of attorney from Curtis F. Short, in 1858, sell and convey to Rufus Ingalls seven acres,

more or less, of the lot of land designated in said partition proceedings as lot 10? ("No. 10.")

"Yes."

12. Did Curtis F. Short, in 1860, sell and convey to E. A. and C. W. Slocum the residue of the lot of land designated in said partition proceedings as lot 10? ("No. 10.")

"Yes."

13. Were the foregoing conveyances, if made, recorded in the auditor's office of this county at or about the time they were made?

"Yes."

75 [Endorsed:] District court, 2nd judicial district, at Vancouver. John W. Brazee *vs.* Mary Schofield *et al.* Findings. Filed April 3d, 1883. G. T. McConnell, clerk.

76 And on Thursday, April 5th, 1883, the following:

JOHN W. BRAZEE

vs.

MARY SCHOFIELD and NICHOLAS SCHOFIELD.

This cause came on for trial at the last term of this court, sitting at Vancouver, and a trial by jury having been waived by the consent given in open court by counsel of the respective parties, said cause was tried before the court without a jury.

Whereupon the evidence, oral and documentary, introduced by the parties was heard, and the cause was submitted to the court for consideration and decision.

And now, at this term, the court files its findings and decision in writing, whereby it is found and decided that the defendants have the better title to the land described in the complaint.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that the title of the defendants to said lands is valid and effectual as against the plaintiff and all persons claiming by, through, or under him, and that the de-

77 fendants have and recover of and from the plaintiff the costs and disbursements of the action, to be taxed, and that execution issue therefor.

[Endorsed:] District court, 2nd judicial district. John W. Brazee, pl'tiff, *vs.* Nicholas and Mary Schofield, def'ts. Decree.

78 JOHN W. BRAZEE, Plaintiff,

vs.

NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

Plaintiff hereby gives notice that he excepts to the findings, decision, and decree of the court in the above cause, and that an appeal or writ of error will be taken by the plaintiff to the supreme court of the Territory of Washington, because of errors of fact and law found by the court.

LEANDER HOLMES,
Att'y for Plaintiff.

79 [Endorsed:] J. W. Brazee *vs.* Nicholas Schofield and Mary Schofield. Preliminary notice of exceptions taken, and that an appeal or writ of error will be taken. Filed April 5th, 1883. G. T. McConnell, clerk.

80 In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver.

JOHN W. BRAZEE, Plaintiff,

vs.

NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

To the defendants, Nicholas Schofield and Mary Schofield, and their attorney:

Please take notice that the above-named plaintiff appeals to the supreme court of said Territory from the decision and decree of said district court in the above-entitled case, entered in the journal in said court on the 5th day of April, 1883, by which it was by said court ordered, adjudged, and decreed that the title to said land (meaning the land described in the pleadings) is valid and effectual as against the plaintiff and against all persons claiming by, through, or under him, and that defendants have and recover of and from the plaintiff the costs and disbursements of this action, to be taxed, and that execution issue therefor, and plaintiff states and sets forth the following as the grounds of his appeal:

81 1st. The district court erred in admitting, over the objections of plaintiff, evidence of the appointment of Esther M. Short as administratrix upon the estate of Amos M. Short, and the records relative thereto prior to the appointment of Henry S. Burlingame as administrator of said estate, for the reason that there is no allegation in the answer that Esther Short was ever appointed as such administratrix.

2d. The court erred in admitting in evidence (over the objection of plaintiff) the petition for the partition of the real estate of Amos M. Short and the proceedings of the probate court of Clarke county, of its officers and appointees, in and about said alleged partition, for the reasons—

1st. That said probate court had no jurisdiction of the subject-matter of said alleged partition.

2d. The petition did not set forth the facts necessary to give said court jurisdiction in said alleged partition proceedings.

3d. The said court never acquired jurisdiction, by the service of process or otherwise, over the parties interested in the subject-matter of said alleged partition.

4th. The parties to said alleged partition had no title to the property described therein.

5th. The proceedings in said alleged partition are imperfect, irregular, and void.

82 3rd. The court erred in admitting in evidence, over the objections of plaintiff, the order appointing Curtis F. Short

guardian of Grant H. Short, and the proceedings of the said probate court thereunder and relative thereto, for the reasons—

1st. Because the said court had no power to appoint said guardian.

2nd. Said guardian did not qualify as such as required by law.

3d. The petition for the sale of the Ward's property did not set forth the facts necessary to give the court jurisdiction to order a sale thereof.

4th. Said order of sale thereof was void because no notice was given to show cause as required by law.

5th. Said order was to sell the right, title, and interest of the said Grant H. Short in the property therein described.

6th. The said sale of the said guardian was void because the court had no jurisdiction to order it and the guardian had no authority to sell.

7th. Said Grant H. Short had no ascertainable interest in the property described in said order.

83 4th. The court erred in admitting, over the objection of plaintiff, evidence tending to show a parol agreement to partition the real estate of Amos M. Short, because said evidence was incompetent and immaterial and not the best evidence.

5th. The court erred in admitting, over the objection of plaintiff, evidence tending to show that the parties to said alleged partition, other than Grant H. Short, had ratified the same—

1st. Because their acts could not bind or affect the said Grant H. Short or his assigns.

2d. The evidence was incompetent and immaterial between the parties to this suit.

6th. The court erred in admitting, over the objection of plaintiff, evidence tending to show the said Grant H. Short had acquiesced in said guardian's sale—

1st. Because said evidence cannot work an estoppel as against him or his assigns.

2nd. It could not affect the rights of the plaintiff in this case.

7th. The court erred in admitting, over the objection of plaintiff, evidence tending to show that plaintiff was not the real party in interest in this suit, 1st, because it was immaterial whether

84 plaintiff held the legal title in trust or not, and his deed was conclusive as against defendant's upon that subject.

8th. The court erred in his 2nd, 4th, 5th, and 18th findings and in each of them, because they are not, nor is either of them, supported by any competent evidence in the case; and he also erred in his 7th, 8th, 9th, 13th, 14th, 15th, 16th, 19th, 20th, 21st, 22nd findings of the first series and in all the findings of the second series, from one to 13, inclusive—

1st. Because the evidence upon which said findings are based was not competent or admissible and was objected to by plaintiff.

2nd. Said findings are immaterial.

3d. Said findings, together, do not warrant and uphold the decree of the court. Said findings are marked filed April 3rd, 1883.

9th. The said court erred in holding and deciding upon said findings and decisions filed as aforesaid that the defendant had the better title to the land described in the complaint.

10th. The court erred in decreeing that by reason of the law and the findings aforesaid that the title of the defendants to said land is valid and effectual as against the plaintiff and all parties claiming by, through, or under him.

85 11th. The court erred in rendering judgement against the plaintiff for the costs and disbursements of this action.

Wherefore, for each and all of the errors as above assigned, the plaintiff appeals in the above-entitled case from the rulings, findings, decision, and decree, as above specified, of said district court, to the supreme court of the Territory.

LEANDER HOLMES,
Plaintiff's Attorney.

[Endorsed:] In the district court of the second judicial district of Washington Territory, holding terms at Vancouver. J. W. Brazee *vs.* N. and M. Schofield. Notice of plaintiff of appeal to supreme court. Filed May 8th, 1883.

86 TERRITORY OF WASHINGTON, *County of Clarke:*

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver.

JOHN W. BRAZEE, Plaintiff,
vs.
NICHOLAS SCHOFIELD and MARY SCHOFIELD, Defendants.

Whereas in the above action the plaintiff having appealed to the supreme court of the Territory from the decision of the district court aforesaid, and security for costs being required by statute to the satisfaction of the clerk:

Therefore know all men by these presents that I, John W. Brazee, as principal, and G. D. Mayou and G. W. Durgin, as sureties, are severally liable and do agree and are bound to pay such costs and charges as may be awarded against the plaintiff by judgement on said appeal, not exceeding five hundred dollars, as witness our hands and seals this the 8th day of May, 1883.

JOHN W. BRAZEE, [L. S.]
By LEANDER HOLMES, [L. S.]
His Attorney.
S. D. MAYOU. [L. S.]
G. W. DURGIN. [L. S.]

87 [Endorsed:] In the district court of 2nd judicial district, holding terms at Vancouver, Washington Territory. John W. Brazee *vs.* N. and Mary Schofield. Supersede-s bond. The sureties on the within bond approved and the bond filed this 8th day of May, 1883. G. T. McConnell, clerk.

88 (Journal, vol 2, p. 339.)

JOHN W. BRAZEE, Appellant,

vs.

NICHOLAS SCHOFIELD, MARY SCHOFIELD, Appellees.

THURSDAY, *July 19th*, 1883.

This cause coming on to be heard upon the transcript of the record of the district court of the second judicial district, holding terms at Vancouver, is argued by Leander Holmes, Esq., and B. F. Dennison, Esq., until the hour of adjournment.

89 JOHN W. BRAZEE, Appellant,

v.

NICHOLAS SCHOFIELD, MARY SCHOFIELD, Appellees.

FRIDAY, *July 20th*, 1883.

This cause coming on for further hearing is argued by B. F. Dennison, Esq., for the appellees, and George H. Williams, Esq., for the appellant, and the said argument being concluded the court takes the matter under advisement.

90 *Opinion.*

Supreme Court of Washington Territory. July Term, 1883.

BRAZEE *vs.* SCHOFIELD *et al.*

Appeal from a judgment of the district court.

George H. Williams and Leander Holmes, for the appellant; B. F. Dennison, for the respondent.

GREEN, *C. J.:*

The first step towards deciding this cause is to determine clearly the nature of what takes place between the United States and its donee, where proceedings are had under the Oregon donation act to establish title in the latter.

By the act there "is granted" to every man of a certain description, or, if he has a wife, then to him and her in equal parts, as shall be set off to them severally, by the surveyor general, a tract of land not to exceed a certain area, on condition that the same shall be selected in a certain way, and in consideration that it shall be resided upon and cultivated a certain length of time. This
91 grant is su-ject, however, to the qualification that if the husband and wife have complied with the provisions of the act so as to entitle them to the grant, and either of them, before patent has issued, shall have died intestate as to his or her share, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the decedent in equal proportions. Throughout the transaction the United States holds the position of seller and the donee that of purchaser.

As soon as the necessary selection has been made and the prescribed residence and cultivation completed the transaction is closed

as far as bargain and sale are concerned. Nothing remains but to assure the vendor or the vendor's agents, the officers of the land office, that as a matter of fact the grant has become effective by meeting a fit grantee who has rendered the proposed consideration, so that they may furnish the grantee with good and sufficient evidence of his title.

92 Final proof, so called, is no part of the consideration which the grantee gives, but is merely evidentiary matter provided for the purpose of satisfying the land office that the right of the grantee is perfect and entitles him to a patent.

The act and not the patent is the instrument which makes the transfer of title. Its language is unmistakable: "There shall be, and hereby is, granted." One conveys, the other evidences title. The patent is but a formal and solemn piece of evidence that all things essential to be done under the donation act before the passage of title have been done, and that therefore under the act title has actually passed out from the United States into the donee. Act and patent together fulfill all the functions of an ordinary deed of conveyance. The two together both convey and evidence title. The patent merely evidences and does no more, but the act evidences to a certain extent only, and then, over and beyond that,

93 does alone and perfectly convey. When patent issues it relates back to and combines with the act as of the date when a fit grantee rendering full consideration appeared, and so as to form with the act a perfect muniment of title.

Title under the donation act, therefore, is always complete before patent issues, and the patent issues by virtue of title completed, and not otherwise. In the case at bar the widow and heirs, if they have acquired any title at all, have got it under the donation act; their patent so recites, and neither they nor any grantee of theirs can, while claiming under that patent, deny it.

They are estopped from saying to the prejudice of any grantee of theirs but that the husband and ancestor, Amos Short, deceased, duly resided upon and cultivated for the prescribed period the donation land claim known as his, or that by virtue of a full compliance with the essential requirements of the donation act his widow and children were at the date of his death, in January, 1853, entitled under the act to that land claim.

94 Such being their situation, the great question of this case is, Has that title, as to the parcel of land here in dispute, passed by reason of their acts from them to the appellees?

All provisions of the donation act necessary and precedent to the passage of title had been complied with prior to 1855, and the widow and children then held among them undivided all disposable interest in the land. In that year or the next, as appears from the evidence, they agreed to, and did as far as they could, divide the claim into halves—an east half and a west half—assigning to the widow the east and to the children the west. This, of course, was subject to whatever decision the surveyor general might make in determining where the division line should be drawn.

Assuming that the surveyor general would affirm or fall in with their decision, and that the west half would by him be set off to them, the children afterward, in 1856, undertook to procure a further division among themselves of that half.

To effect this those of them who were of age applied per-
95 sonally, and those not of age by guardian, to the probate court for a partition.

Pursuant to or connected with that application a partition—at least in form—was made or sought to be made by the court.

Considered as a judicial proceeding, it was doubtless void, except in so far as it engaged the court in supervising and sanctioning the acts of the participating guardians; but the formal partition all the heirs willingly made actual and substantial by each personally or by guardian spontaneously taking possession and dominion in severalty of his or her portion and by mutually paying and accepting owelty sufficient fully to equalize all the allotments.

Was it in fact, then, valid or void? It is agreed by appellant that it was void for three reasons: *First*—

1st. Because the guardians acted without authority and have never had their action affirmed by their wards since the latter became of age.

2nd. Because it was by parol and not by deed.

96 3rd. Because that half of the donation claim which the heirs undertook to subdivide had not yet been assigned to them by the surveyor general.

As to the first objection, the assumption that the guardians acted without authority is not borne out by the record. They were in presence of that court which had peculiar and general jurisdiction over them; they were parties to the petition for partition among the children; they proceeded, in the partition among the children, on the basis of the previous partition between the widow and children; they acted throughout under the eye of their supervising court, and their action, after all was done and with everything in full view and fully understood, was solemnly ratified and confirmed by that court.

If a partition be compelled it may also be voluntary.

In a voluntary partition proposing to set apart the shares of the minors those who have charge of the estates of the minors
97 have power to act for their wards under supervision of the court which has the estates in charge. Whether they act with due authority to bind their wards can be seen by inspecting the record of the court. If they act with judicial authority they bind their wards; otherwise not.

Where the record shows that the matter which the court considered was within its jurisdiction and all necessary parties were before it, there the action of the court, however irregular, is proof against collateral attack.

But, even admitting that the guardians acted without authority, the wards, on coming of age, were not absolutely obliged to reject what their guardians did; they had an election; within a reasonable time they could affirm or disaffirm. If within a reasonable time after reaching majority they did not disaffirm they thereby

affirmed. In the case before us their acquiescence since becoming of age has continued for periods varying from eight to twenty years. Having assented for so many years of their ma-
98 jority to both partitions, they are now forever bound by both.

To the second objection we answer that a parol partition, which has been actually consummated by possession and dominion in severalty, and which has been confirmed by long-continued acquiescence and by many changes of title, ought not to be and will not be disturbed in equity. There are cases holding that it affords a legal severalty, even in face of a statute requiring transfers of realty to be in writing or by deed; but we do not need to go that far. Possession and dominion, initiated by consent, have been held adversely under these partitions for a quarter of a century. Guardians, under supposed authority of the proper supervising court, have undertaken to bind their wards' interests.

Wards, on becoming of age, have affirmed by long acquiescence, and many of them by express acts, the doings of their guardians. Estates have passed for full value into the hands of purchasers.
99 Costly improvements have been made in full faith of the stability of what has been done. The strongest possible interlacing equities now bind the parties to remain henceforth forever fixed in their relative positions.

To the third objection the familiar principle applies that where one has, by bargain and sale, for valuable consideration, which he has actually received and enjoyed, undertaken to dispose of a proprietary interest, which he had not at the time, but afterwards acquired, his acquisition of it inures to the use of his quondam vendee.

If the action of the surveyor general had been such that these heirs could never have, each of them, an undivided tenth of the west half to dispose of, then their partition would have turned out to be indeed an empty affair. But so it happened that the award of the surveyor general to the heirs in 1874 exactly coincided with their appropriation for themselves and partition among themselves of 1856.

Their titles have fallen just along the lines and into the
100 spaces which, for mutual and valuable considerations, long ago paid and spent, they had intelligently and advisedly marked out and provided. To the meeting of their own minds it was only necessary to add the mind of the surveyor general. In 1874, before their minds had drawn apart, his was added, and then, therefore, by relation of his award back to 1856, no one yet dissenting, the partition, so far as this aspect of it is concerned, became perfected.

Under these partitions Grant H. Short, one of the minor children, became invested with and possessed of a share of the west half, known as lot No. 7, which is the land in controversy. He held and dealt with this lot as his until 1865. In that year, while he was still a minor, his guardian, who was one of his brothers, acting under direction of the probate court, sold it to the appellee, Nicholas Schofield, for seven hundred and eighty-five dollars, a fair price for it.

This sum was applied by direction of the probate court in
101 payment of a mortgage debt upon the premises and of other debts proved and allowed against the minor's estate. Next year Grant H. Short attained his majority. After twelve years of silence he, in 1878, gives to appellant's grantor a quitclaim deed of all his right, title, and interest in the donation claim. About the same date the rest of the children gave to appellant's grantor similar deeds as to their respective interests. Meantime appellees have put upon the premises permanent improvements of great value.

Now the appellant contends that this last guardian's sale was void, for reasons reducible to two; first, because there was no certain description of the property to be sold in the petition for sale; and, second, because no notice was given, such as the order of the court and the statute required; third, the proceedings before sale show irregularities; but they were not, in our opinion, such as open the decree confirming the sale to collateral attack. Enough is in the petition to show that the probate court was asked to act upon
102 a definite matter within its proper jurisdiction. In all that it did from the petition to the decree of confirmation it was a court of record, acting within its proper sphere, and however erroneous in action and however liable to be reversed in error it is entitled to have its adjudication stand impregnable until so impugned.

But if we regard the judicial proceeding as invalid our attention is arrested by the fact that the ward and all others interested have let at least twelve years go by without offering to question it, during eight of which years every one of them has been of full age. Entire though tacit acquiescence for such a length of time is equivalent to most solemn express affirmance. From twenty-one to thirty-three years of age, in full possession of his faculties, well aware of all the circumstances, Grant H. Short has lived along without allowing to escape him a single intimation disapproving the act of his guardian.

The other children during the same space, but for different
103 periods of majority, have done likewise. They have thus, every one of them, thoroughly and forever estopped themselves from disavowing that act.

In conclusion, we will say that, in our opinion, the decision of this whole case may be satisfactorily planted on the doctrine of estoppel. If there be such a thing as estoppel by failure to make objection within a reasonable time to doings done colorably in one's own name and whereof he has had the benefit and which are susceptible of being ratified because bearing fruits capable of being legitimately enjoyed, then this is the case, as seems to us, where the estoppel occurs.

Appellant could at the most recover only the interests of the heirs not estopped. His case is strongest where he represents the minors, and among them it varies in strength in proportion to their length of nonage, respectively, after their father's death; but the youngest child was eight years of full age before he ventured by quit-
104 claim deed or in any other way spontaneously or on solicitation to object to what had been done for him by guardian at periods varying from thirteen to twenty-one years previously.

The very youngest of these children has slept on his alleged rights too long to be heard now to press them in a court of equity.

Let the judgment of the district court be affirmed.

Wingard, J., and Hoyt, J., concurred.

105 *Judgment.*

(Jour., p. 381.)

JOHN W. BRAZEE, Appellant,

vs.

NICHOLAS SCHOFIELD, MARY SCHOFIELD, Appellees.

MONDAY, *August* 6, 1883.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the second judicial district of Washington Territory, holding terms at Vancouver, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 6th day of August, A. D. 1883, on motion of B. F. Dennison, Esq., of counsel for appellees, considered, adjudged, and decreed that the judgment of the said district court be, and the same is hereby, affirmed, with costs, and that the said Nicholas Schofield and Mary Schofield recover of
106 and from the said John W. Brazee the costs of this action, taxed and allowed at fifty-six $\frac{15}{100}$ dollars, and that execution issue therefor.

107 *Interrogatories Propounded by the Defendants to John W. Brazee, Plaintiff, to be Answered by Him on Oath.*

TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver for the Counties of Clarke and Skamania.

JOHN W. BRAZEE, Plaintiff,

vs.

NICHOLAS SCHOFIELD & MARY SCHOFIELD, Defendants.

1. What interest have you in the above-entitled case?

2. If you have any interest in same case, state how and when and from whom you acquired such interest.

3. Has any other person any interest, present or prospective, with you in said case? If so, state who, and what interest such person has, actual or contingent or both, and how and when the person acquired such interest.

4. State what interest you have, if any, in the land described
108 in the complaint in the above-entitled action, how and when you acquired it, and how much you paid for it.

5. If you acquired an interest in said land by purchase state who furnished the money and how much to pay for it and to whom the same was paid and by whom it was paid.

6. When, if at any time, did you become owner in fee of the land described in your complaint in said action?

7. State from what source and by what deed or conveyances you claim to be the owner in fee of said land, referring to each, and of the deeds and grantors by which and through whom you derived your alleged title and right of possession.

FRANK CLARK AND
B. F. DENNISON,
Attorneys for Defendants.

WASHINGTON TERRITORY } ss:
County of Clarke, }

I, G. T. McConnell, clerk of the district court of the second judicial district of Washington Territory, holding terms at Vancouver, do hereby certify that the foregoing is a true copy of the interrogatories propounded by the defendants to John W. Brazee, the plaintiff in the case of John W. Brazee *vs.* Nicholas Schofield and
109 Mary Schofield, and filed in said court this twelfth day of October, 1882.

In witness whereof I have hereunto set my hand and the seal of said court this twelfth day of October, 1882.

G. T. McCONNELL,
Clerk as Aforesaid.

110 [Endorsed:] District court, 2nd judicial district, W. T., holding terms at Vancouver. John W. Brazee *vs.* Nicholas Schofield and Mary Schofield. Copy. Interrogatories. Filed October 12th, 1882. G. T. McConnell, clerk. Frank Clark and B. F. Dennison, attorneys for defendants.

111 TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

In the District Court of the Second Judicial District of Washington Territory, Holding Terms at Vancouver for the Counties of Clarke and Skamania.

JOHN W. BRAZEE, Plaintiff,

vs.

NICHOLAS SCHOFIELD & MARY SCHOFIELD, Defendants.

JOHN W. BRAZEE, the above-named plaintiff, being first duly sworn, in answer to the interrogatories propounded to him by the said defendants and filed in said court October 12th, 1882, says:

Answer to interrogatory No. 1. I have no interest in the above-entitled case, except that I hold the title to the land claimed therein in trust for Leander Holmes & David Goodsoll.

Answer to interrogatory No. 2. I have an interest in said case as above stated and not otherwise & & I acquired such interest by a

deed executed to me on the 1st day of March, 1882, by Al-
112 bertina E. Wintler, executrix, &c., and Albertina E. Wintler, Harvey H. Gridley, and Amanda E. Gridley, Charles H. Whitney and Caroline N. Whitney, Gay Hayden and Mary Jane Hayden, Samuel R. Whipple and Charlotte A. Whipple, Charles Brown and Rebecca A. Brown. Said deed embraces all the land in controversy in this suit and is duly acknowledged and was recorded in the auditor's office of said county of Clarke on the 4th day of March, 1882.

Answer to interrogatory No. 3. Said Leander Holmes and David Goodsoll are the beneficiaries for whom I hold the land in question in trust, and they acquired their interest at or about the time said deed was executed to me.

Answer to interrogatory No. 4. I answer this as I answered interrogatory No. 1—and I paid nothing for my interest.

Answer to interrogatory No. 5. I have an interest in said land as above stated, but I do not know, except from hearsay, who paid for the land or how much was given or to whom or by whom it was paid.

Answer to interrogatory No. 6. I am the owner in fee of
113 the land described in the complaint in trust as here and before stated, and I became such owner by virtue of the deed described in my answer to the above interrogatory No. 2.

Answer to interrogatory No. 7. I claim to be the owner in fee of said land, as above stated, through the deed described in my answer to interrogatory No. 2. I cannot refer particularly to the deeds to my grantors, because they are not in my possession or under my control, but I understand that all of the heirs of Amos M. Short, deceased, executed and delivered to my grantors deeds for all of their interests in the west half of the donation land claim of Amos M. Short and Esther Short in said county, & that all of said deeds are upon record in the auditor's office in said county of Clarke.

J. W. BRAZEE.

Subscribed and sworn to before me this 2nd day of November, A. D. 1882.

GEORGE H. DURHAM,
Commissioner of Deeds for Washington Territory,
Residing at Portland, Oregon.

114 [Endorsed:] In the district court of the 2nd judicial district of Washington Territory, holding terms at Vancouver for the counties of Clarke and Skamania. John W. Brazee, pl'ff, *vs.* Nicholas Schofield and Mary Schofield, def'ts. Answer of John W. Brazee to interrogatories filed in said cause. Filed November 2nd, 1882. G. T. McConnell, clerk.

115 *Application for Appeal from Decision of Supreme Court of Washington Territory.*

JOHN W. BRAZEE, Plaintiff and Appellant,
vs.
NICHOLAS and MARY SCHOFIELD, Defendants and Appellees.

The above-named John W. Brazee, the appellant, conceiving himself aggrieved by the final decree entered on the 6th day of Aug., 1883, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court.

LEANDER HOLMES,
Attorney for Appellant.

116 [Endorsed:] In the Supreme Court of United States. John W. Brazee *vs.* Nicholas & Mary Schofield. Application for appeal. Received and filed July 1st, 1884. R. G. O'Brien, clerk.

117 *Citation to Supreme Court of United States.*

UNITED STATES OF AMERICA, } ss:
Territory of Washington, }

JOHN W. BRAZEE, Appellant,
vs.
NICHOLAS and MARY SCHOFIELD, Appellees.

To Nicholas and Mary Schofield, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington city on the second Monday of October, A. D. 1884, pursuant to an appeal filed in the office of the clerk of the supreme court of Washington Territory, wherein John W. Brazee is appellant and you appellees, to show cause, if any there be, why the decree or judgement rendered by the supreme court of said Territory in the above cause should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Dated this 1st day of July, A. D. 1884.

JOHN P. HOYT,
Associate Justice of the Supreme Court of Washington Territory.

118 TERRITORY OF WASHINGTON, } ss:
County of Clarke, }

I, Frank Nerton, sheriff Clarke Co., W. T'r'y, do hereby certify the within written citation came into my hands for service the 15th day of July, 1884; and I further certify that I served a true and correct copy of the original citation to each of the within-named defendants by delivering to them each personally a copy of the within citation this 15th day of July, 1884.

FRANK NERTON, *Sheriff.*

Fees:

Serving two citations	$2 00
Copying the same	0 80
Miles travel	0 20
	$3 00

[Endorsed:] In the Supreme Court of the United States. John W. Brazee *vs.* Nicholas and Mary Schofield. Citation to Supreme Court of United States.

119 In the Supreme Court of the United States.

JOHN W. BRAZEE, Plaintiff, Appellant,

vs.

NICHOLAS & MARY SCHOFIELD, Defendants, Appellees.

Know all men by these presents that we, John W. Brazee, L. D. Brown, of Portland, Oregon, and S. D. Maxon, of Vancouver, Washington Territory, are held and firmly bound unto Nicholas and Mary Schofield, of Clarke county, Washington Territory, in the sum of one thousand dollars, to be paid to the said Schofields, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 25th June, A. D. 1884. Whereas the above-named John W. Brazee hath taken an appeal to the Supreme Court of the United States to reverse the decree or judgment rendered in the above-entitled action by the supreme court of Washington Territory, now, therefore, the
120 condition of this obligation is such that if the above-named John W. Brazee shall prosecute his appeal to effect and answer all costs that shall arise if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN W. BRAZEE, [L. S.]
By LEANDER HOLMES,
His Attorney.
L. D. BROWN. [L. S.]
S. D. MAXON. [L. S.]

Justification.

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

S. D. Maxon, of Vancouver, Washington Territory, being sworn, deposes and says for himself that he is worth the sum of $2,000 *dollars* over and above his just debts and liabilities and property exempt from execution.

S. D. MAXON.

Sworn to before me this 25th June, A. D. 1884.
[SEAL.] G. T. McCONNELL,
Deputy Clerk District Court at Vancouver, Wash. T'y.

121 [Endorsed:] In the Supreme Court of United States. John W. Brazee, appellant, *vs.* Nicholas and Mary Schofield, appellees. Bond for costs on appeal. I hereby approve of the within bond and the sureties therein named. Dated July 1st, 1884. John P. Hoyt, associate justice of the supreme court of Wash. Ter'ry. Received and filed July 1st, 1884. R. G. O'Brien, clerk.

122 In the Supreme Court of Wash. Ter. July Term, 1883.

JOHN W. BRAZEE *vs.* NICHOLAS SCHOFIELD *et ux.*

I, R. G. O'Brien, clerk of the supreme court of Washington Territory, hereby certify the foregoing and annexed writings to be true copies from the transcript of the record of the district court of the second judicial district of Wash. Ter. holding terms at Vancouver, the same purporting to be the pleadings upon which the said cause was tried and determined in said district court, together with the proceedings of this supreme court, to wit:

1. The amended complaint.
2. The second amended answer.
3. The demurrer to amended answer & rule on same.
4. The reply.
5. Submission for trial by the court.
6. Plaintiff's answers to interrogatories.
7. Findings of fact by court.
8. Judgment of the district court.
9. Notice of exceptions and that appeal would be taken.
10. Notice of appeal and assignment of errors.
11. Bond on appeal.

123 12. Record entries in supreme court W. T.

13. Opinion of supreme court.
14. Judgment, supreme court.
15. Allowance of appeal to Supreme Court United States.
16. Citation.
17. Bond on appeal to Supreme Court U. S.

In testimony whereof I have hereunto set my hand and the seal of said supreme court this 1st October, A. D. 1884.

[Seal Supreme Court Washington Territory.]

R. G. O'BRIEN, *Clerk.*

124 *Cost Bill.*

In the Supreme Court of W. T. July Term, 1884.

JOHN W. BRAZEE *vs.* NICHOLAS and MARY SCHOFIELD. } No. 361.

Clerk's fees	$23 90
Binding transcript	2 25
Sheriff's fees	
Printing brief	15 00
Attorney fee	15 00
Miscellaneous fees, transcript to Supreme Court U. S.	54 30
Total	$110 45

TERRITORY OF WASHINGTON, } ss:
County of Thurston, }

Leander Holmes, being first duly sworn, says that he is of counsel for the appellant in the above-entitled cause, and that the foregoing is a true exhibit of the costs and disbursements necessarily incurred and expended in said cause and court, and that the same is true, as he verily believes.

LEANDER HOLMES.

Subscribed and sworn to before me this first day of October, 1884.

R. G. O'BRIEN, *Clerk.*

[Endorsed:] No. —. In supreme court W. T. July term, 188–. —— —— *vs.* —— ——. Cost bill. Filed —— —, 188–.

Endorsed on cover: Washington Territory supreme court. No. 114. John W. Brazee, appellant, *vs.* Nicholas Schofield and Mary Schofield. Filed 16th October, 1884.

124-495

124-495

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 114

JOHN W. BRAZEE, Appellant.

vs.

NICHOLAS SCHOFIELD,
and
MARY SCHOFIELD, Appellees.

Appeal from the Supreme Court of the Territory of Washington.

BRIEF AND ARGUMENT

OF

LEANDER HOLMES,
On the part of Appellant.

The Lewis & Dryden Printing Co., First and Ash Sts., Portland, Or.

Supreme Court of the United States.

OCTOBER TERM, 1887.

JOHN W. BRAZEE,
Appellant,
vs.
NICOLAS SCHOFIELD, and
MARY SCHOFIELD,
Appellees.

On Appeal from the Supreme Court of Washington Territory.

BRIEF AND ARGUMENT ON THE PART OF THE APPELLANT.

STATEMENT.

This suit was brought by appellant on the 11th day of March, 1882, in the District Court of the Second Judicial District of Washington Territory, as an action for the recovery of the possession of about thirty-five acres of land.

TITLE OF APPELLANT.

In this action appellant claims the legal and only title to the land described in the complaint by virtue of the conveyance of the title by patent from the United States to the heirs of Amos M. Short on the 13th day of October, 1877, and by conveyance of all of said heirs since said 13th day of October, 1877, to appellant's grantors, all of which is admitted in the pleadings.

CLAIM OF TITLE BY APPELLEES.

By the allegations of the answer in this case appellees claim title and right of title by virtue of an alleged donation land claim of Amos M. Short, and through an alleged Probate Court partition proceedings of said alleged claim among his children in 1856, as the real estate of Amos M. Short, deceased, and the purchase by appellees of one of said partition allotments from the guardian of Grant H. Short, one of said children, in 1865.

CONDENSED STATEMENT OF FACTS ALLEGED.

That in the year 1848 Amos M. Short and wife went upon and cultivated portions of the public land on the north bank of the Columbia river, then in the Territory of Oregon, now within the Territory of Washington.

That Amos M. Short died in January, 1853, without having filed on or taken a donation land claim, leaving a wife and ten children.

2D.

It is alleged in the amended answer and admitted to be true that (near nine months) *after* the death of Amos M. Short, *Esther Short*, his widow, in October, 1853, filed the (only) notification No. 446 with the Surveyor General for this alleged donation land

claim No. 51, and filed for 640 acres of land (and in said notification she claims the right to so file under the Act of Congress approved February 14th, 1853, amendatory of the Donation Act of 27th September, 1850, passed after the death of Amos M. Short.)

3D.

Appellant admits that in 1855 there was an alleged division of said alleged claim into east and west halves between the widow and some of the children, and was followed by an alleged partition of the west half among said children by the *Probate Court* of Clarke County as *real estate*, of Amos M. Short, deceased, substantially as set out in the sixth separate answer and defense of said amended answer. See record page.

5 6 6

4TH.

It is admitted that on the 31st day of July, 1874, the certificate was issued by the register and receiver by which the west half of said alleged claim was assigned to Amos M. Short, and the east half to Esther Short, and that on the 13th day of October, 1877, a patent was issued to Amos M. Short *and to his heirs*, for the title to said west half of said land.

In 1878, these ten heirs pending a suit to recover the possession of the lands, sold and deeded each his and her undivided interest in the whole land claim thus patented to them, to Sam'l R. Whipple, who acted as trustee in trust for the occupants in possession under the alleged Probate Court Partition proceedings of 1856. All except four parties accepted and perfected their titles through said trusteeship.

These appellees refused to accept the title thus held under the patent. After long delay, full notice and refusal, said Whipple, et al, sold and conveyed this land in 1882 to the appellant in this action, hence this suit.

The amended answer denies all the allegations of

the amended complaint, and alleges that for a long time, prior to and at the commencement of this action, the defendants were, and ever since have been, and now are the owners in fee, and entitled to the possession of the whole of said parcel of land.

THE AMENDED ANSWER.

1st.

The first separate answer and defense claims that the deeds by which the Short heirs in 1877 and 1878 conveyed their title to plaintiff's grantors, are inoperative and void, because said deeds were granted while out of possession, and while defendants and their grantors were and had been in the notorious and exclusive possession for many years under claim and color of title in good faith.

The second separate answer and defense alleges possession and improvements, and claims the right to offset an amount equal to any damage that plaintiff may recover.

3d and 4th.

The 3d and 4th separate answers and defenses plead the statue of limitations of 20 years and 10 years.

5th.

Pleads guardian's sale of the right, title and interest of Grant H. Short in the land in dispute to defendant N. Schofield, in April, 1865, by order of Probate Court.

6th.

The sixth separate answer is an alleged equitable defense, addressed to the Court,and sets forth fully all that was ever done by Amos M. Short in his life time. That long after his death, Esther Short filed her notice, and took said claim in October, 1853, near nine months after the death of said Short; and then

shows at great length all that was done afterwards by Esther Short, the minor children, and the Probate Court in treating this claim of Esther Short, as the donation claim of Amos M. Short, deceased, through whom the defendants below claim possession, and their only title, legal or equitable.

1st. It alleges "that Amos M. Short and wife set-"tled upon and cultivated a portion of this claim from "March 8th, 1848, until his death in January, 1853. "That after the death of Amos M. Short, Esther "Short on or about the 4th day of October, 1853, "caused to be filed in the office of the Surveyor Gen-"eral at Oregon City, Oregon, the notification No. "446, of Amos M. Short and Esther Short upon said "donation land claim, showing that said Amos M. "Short was competent to take the same."

2d. That on the 31st day of July, 1874, said donation Certificate No. 275 was duly issued, by which the west half of said claim was assigned to Amos M. Short, and the east half to said wife, Esther Short, who died on or about the 28th day of June, 1862.

3d. That a patent was issued on the 13th day of October, 1877, to the heirs of Amos M. Short, to the west half of said claim, and to Esther Short and to her heirs, the east half of said claim.

4th This separate answer and defense alleges and shows that the only claim of title to the land in dispute by appellees is founded on an alleged *Probate Court Partition Proceedings* in 1856, of the west half of said alleged claim of Esther Short as the *real estate* of Amos M. Short, deceased, by which *Partition Proceedings* the land in dispute was set apart by the Probate Court to a minor child, Grant H. Short, and whose right, title and interest therein was, in 1865, sold by his guardian by order of the Probate Court, and was bought by Nicholas Schofield, one of the defendant appellees in this action.

A quit claim deed of the minor's right, title and interest in this land known as lot No. 7, as set apart to Grant H. Short by the Partition Proceedings of 1856, was executed on the 29th day of April, 1865, by order of the Probate Court, to said Nicholas Schofield.

THE DEMURRER.

Whereupon plaintiff by his attorneys filed his demurrer to the first separate answer and defence; to the fourth separate answer and defense; to the sixth separate answer and defense; for the reason that said separate answers and none of them contains or states matter sufficient to constitute a defense, which demurrer thereafter coming on to be heard at Kalama was strangely waived as to the sixth separate answer and defense, and overruled; as to the remainder, by the consent of an attorney acting at the time for the plaintiff below, whereupon it was ordered that plaintiff have forty days to reply to the amended answer. Record page — 12

THE REPLY.

It will be seen that the reply of the plaintiff below to the amended answer puts in issue all the allegations of said answer, claiming title, the right of title, or the right of possession of the defendants below to the land in controversy, and denies the same.

Denies that defendants *could claim* under *color of title* or in *good faith* to be the owners in fee, or otherwise, of said land, or that the possession of which by defendants *could be* or *was adverse,* secured through the action of a *Court* without *jurisdiction.* See Reply page — 13-14-15

And avers that said Probate Court had no *jurisdiction* over the subject matter, or *power* to act at all; and alleges that the whole proceedings of said Probate Court were wholly and absolutely void, and

could give to defendants possession, neither *title* or *color of title.* See Record, page — 14-15

THE TRIAL.

At the November term, 1882, by consent of parties in writing the case was tried by the court. On the trial the court erroneously received as evidence, over the objections of plaintiff, the record proceedings of the Probate Court of Clarke county, of its officers and appointees in, and in regard to said alleged partition proceedings of 1856.

That on the 8th of March, 1883, the district court rendered its opinion substantially as follows: "That the alleged proceedings in partition by the probate court of Clarke county were *void* and of *no effect* as such, and did not divest the heirs of their undivided interest in the whole tract of land sought to be partitioned; but that these void illegal proceedings were properly admitted in evidence, as tending to show the existence of certain facts, in the light of which the acts of the said heirs should be viewed, and interpreting the acts of each and all of them in connection with the facts made to appear by said attempted partition proceedings. I am of opinion that they are each and all equitably estopped from asserting as against each other any title to any part of said land, except the part assigned each in the said attempted partition proceedings. * * * * That though the legal title to the land in controversy is in the plaintiff; yet a court of equity will not allow it to be enforced against defendants, and there must be a judgment in their favor. Let findings and a decree be prepared and submitted." R 19-20

APPEAL

TO SUPREME COURT OF THE TERRITORY.

On the 8th day of May, 1883, plaintiff filed his notice of appeal to the Supreme Court of the Terri-

tory, and for grounds of appeal set forth the *errors* of the District Court in its rulings, findings and judgment. See record pages. 25-26-27

ASSIGNMENT OF ERRORS.

The District Court erred in overruling plaintiff's demurrer to the first and fourth separate answers and defenses.

II.

The court erred in permitting the waiver of the sixth separate answer and defense, because said separate answer does not state a defense of any description.

III.

The court erred in not sustaining plaintiff's demurrers to the amended answer, and in not dismissing the same, because said answer did not set up a defense at law or equity. Record P. 12

ASSIGNMENT OF ERRORS BELOW.

I.

The District Court erred in admitting, over the objections of plaintiff, evidence of the appointment of Esther Short as administrator upon the estate of Amos M. Short, and the records thereto prior to the appointment of Henry S. Burmingham as administrator of said estate, for the reason that there is no *allegation* in the answer that Esther Short was ever appointed as such administrator.

II.

The court erred in admitting in evidence (over the objection of plaintiff) the petition for the partition of the real estate of Amos M. Short, and the proceedings of the Probate Court of Clarke county, of its officers and appointees in, and about said alleged partition, for the reason:

First. That said *Probate Court* had no *jurisdiction* of the subject matter of said alleged partition,

Second. The petition did not set forth the facts necessary to give any court *jurisdiction* in said alleged partition proceedings.

Fourth. The parties to said alleged partition had no title to the property described therein.

Fifth. The proceedings in said alleged partition are imperfect, irregular and absolutely void.

III.

The court erred in admitting in evidence (over the objection of plaintiff) the order appointing Curtis F. Short guardian of Grant H. Short, and the proceedings of the said Probate Court thereunder, and relative thereto for the reason:

First. Because the said court had no power to do so.

Third. The court did not have jurisdiction to order a sale of the ward's property.

Fifth. Said order was to sell the *right, title and interest* of the said Grant H. Short in the property therein described.

Sixth. The said sale of said guardian was void, because the court had no jurisdiction to order it, and the guardian had no authority to sell.

Seventh. Said Grant H. Short had no *ascertainable interest* in the property described in said order.

IV.

The court erred in admitting (over the objection of the plaintiff) evidence tending to show a parol agreement to partition the *real estate* of *Amos M. Short,* because said evidence was incompetent and immaterial and not the best evidence.

V.

The court erred in admitting evidence tending to

show that the parties to said alleged partition, other than Grant H. Short, had ratified the same, because it could not bind G. H. Short, and was incompetent and immaterial.

VIII.

The court erred in his 2d, 4th, 5th and 18th findings, and in each of them, because they are not, nor is either of them supported by any competent evidence in the case, and he also erred in his 7th, 8th, 9th, 13th, 14th, 15th, 16th, 19th, 20th, 21st and 22d findings of the first series, and in all the findings of the second series from 1 to 13 inclusive.

First. Because the evidence upon which said findings are based was not competent or admissible, and was objected to by plaintiff.

Second. Said findings are immaterial.

Third. Said findings together do not *warrant* and uphold the decree of the court. Said findings are marked filed April 3d, 1883.

IX.

That the court erred in deciding upon said findings filed as aforesaid that the defendants had the better title to the land described in the complaint.

X.

That the court erred in decreeing that by reason of the law and the findings aforesaid, that the title of the defendants to said land is valid and effectual as against the plaintiff and all parties claiming by, through or under him.

XI.

The court erred in rendering judgment against the plaintiff for the costs and disbursements of this action.

Whereas, for each and all of the errors as above assigned, the plaintiff appeals in the above entitled

case from the rulings, findings, decision and decree of said District Court to the Supreme Court of the Territory.

On a hearing, at the July term, 1883, before the Supreme Court of the Territory, after a long opinion by the Chief Justice of said court (which will be hereafter noticed), the judgment of the District Court was, on the ground of the estoppel, affirmed.

Whereupon an appeal was taken to this court for review.

THE OPINION OF THE SUPREME COURT.

This court, on appeal, fell into the same error in assuming that Amos M. Short was the *donee*, although the court's special attention was called to the fact that in the answer he is alleged to have done nothing but reside upon and cultivate portions of the land prior to, and up to the time of his death, but that Esther Short, after her husband's death, took this claim by filing the notice with the Surveyor General at Oregon City. But in the opinion of the court no mention of this is made, except to erroneously *argue* that "as soon as the necessary selection has been "made and the *prescribed residence* and *cultivation* "*completed* the transaction is closed, as far as bargain "and sale is concerned." Not a word about the *notice required to be given* the *Surveyor General* by the settler, or the proof required. See 6th and 7th sections of the act. But the court further says that "nothing "further remains to be done but to assure the officers "of the land office that the grant has become effect-"ive."

The answer shows this was not done until the 31st day of July, 1874. Yet the court holds that "all "the provisions of the donation act necessary and "precedent to the passage of title had been complied "with prior to 1855, and the widow and children

"then held among them, undivided, all disposable "interest in the land."

This also shows that the Supreme Court also *ignored* the alleged fact that Amos M. Short *died* without having *filed his notice for this claim*, and that Esther Short was the only party who ever took this claim by filing her notice with the Surveyor General after the *death of said Short*. The notice was for herself and children, not mentioning the name of her deceased husband. Still the court holds that this claim was the claim of Amos M. Short directly in the face of the allegation of the answer to the contrary. The Supreme Court, thus assuming that said Short was the *donee*, and that the title was perfect in 1855, proceeds to sustain the binding character of the alleged partition proceedings of 1856, of the west half of this land as the real estate of Amos M. Short, deceased, among his children, and sustains the jurisdiction of the Probate Court in 1865, in ordering the sale of the property in dispute. And thus the court proceeds, disregarding the allegation of the answer showing this land was not taken by Amos M. Short, ignoring all irregularities and violations of law, arguing and reasoning to make these illegal and void proceedings inure to the benefit of the actors.

And so far as the opinion of the Supreme Court below is concerned, it holds "that residence and cul- "tivation for the prescribed period, or by a full com- "pliance with the *essential* requirements of the dona- "tion act, his widow and children were, at the date "of his death, in January, 1853, entitled under the "act to that land claim." Ignoring that the taking a claim by filing a notification with the Surveyor General was an *essential* requirement of the law; thus disregarding the 6th and 22d sections of the donation act. Nor deigns to notice the ruling in Fitzpatrick vs. Dubois, 2 Saw., p. 435. Or the decision

of this honorable court in Hall vs. Russell and Vance vs. Burbank, 101 U. S., pp. 510 and 521.

GUARDIAN'S SALE.

As to the above sale in 1865, by order of the Probate Court, of the lot of land in dispute. The Supreme Court fully sustained the proceedings and notices, as the objections of plaintiff, some alleged irregularities assigned, not noticing the *vital* objection set out in the plaintiff's third assignment of error, that plainly denied the authority, power or jurisdiction of the Probate Court to act at all because of the void partition proceedings, and because said Grant H. Short had at that time no ascertainable interest in the property described in said order. Which, if the allegation of the sixth separate answer and defense, as to who took and filed the notice with the Surveyor General in Oct., 1853, is true, then neither the Probate Court, nor any person in 1856 or 1865, had any authority or power to partition or dispose of said land. But in conclusion the court seems to abandon the judicial proceedings as *invalid*, and holds that this whole case may be satisfactorily planted on the doctrine of the estoppel. Let the judgment of the District Court be affirmed.

That the District and Supreme courts below were wrong in their ruling, findings, opinions and judgment in this case, under the alleged facts and pleadings therein, seems to us apparent, and this same Supreme Court, in 1885, in a case precisely the same, for the possession of an adjoining allotment on the same claim—the fourth separate answer being a copy of the sixth in this case—on a motion to dismiss, this same court held as follows: "That said fourth "defense was apparently intended as a plea of equita- "ble estoppel" (and then adds), "Let the *intent be what it may. The matter pleaded did not, in our*

opinion, display facts sufficient to constitute a defense of any description. 2 W. T. R., p. 464

In 1883 the plea is a complete defense, and creates an *equitable estoppel.* In 1885 it's *no defense* of any description. Sometimes courts *improve* or go back to their first love.

IN THE CASE OF THE HEIRS OF AMOS M. SHORT *vs.* SAMUEL R. WHIPPLE.

In the first *test suit* arrising out of this alleged donation claim the allegations of the answer to sustain an *estoppel* were the *same* as are set forth in the sixth separate answer and defense of these appellees.

On demurrer the court said: "The matters do "not amount to an estoppel. The fact is apparent "on the face of the pleading that the defendant, "Samuel R. Whipple, undertook to purchase a title, "and purchased, at most, the interest of only one of "several part owners. The other part owners knew "of his purchase and of his making improvements, "and neither made any objection nor encouraged him "in it. He knew of their existence, or took on him-"self the risk of their coming to light when he pur-"chased and improved. Of their title he was in-"formed by statute law. It is a plain case of *caveat* "*emptor.* If he was deceived and deluded, he *de-*"*ceived* and *deluded himself.* He seems to have been "willing to earn loss by extraordinary negligence. "He could not by entering and improving another's "land, however openly and notoriously, nor by placing "upon it improvements, however costly, shorten the "period prescribed by the statute of limitations for "asserting an adverse title. Let the demurrer be "sustained." Rendered in Nov. 1877.

This was the first ruling of Judge Green as to the *insufficiency* of this alleged equitable defense in the above case. But in 1883 this judge, as chief justice

in this case, sustains its sufficiency as an *equitable estoppel.*

Then in 1885 this same judge and court holds "That this same defense does not display facts suf-"ficient to constitute a defense of any description."

REMARKS.

It is apparent that the rulings, findings, opinion and judgment of the District Court (and which were adopted by the Supreme Court) were based upon the assumption that this alleged donation land claim, No. 51, was taken by Amos M. Short, in his lifetime, and that on his death, in January, 1853, his right as a donee inured to his wife and children, under the 8th section of the donation act of 27th of Sept., 1850. The Supreme Court below, in its opinion, holds that "*residence* and *cultivation* for the *pre-*"*scribed period* on the claim were sufficient, and that "the widow and children were, at the date of his "death, 1853, entitled, under the act, to that land "claim" This, may it please the court, was certainly inserted to escape the force of the allegation in the sixth separate answer and defense, that "Esther Short, "after the death of Amos M. Short, filed the notifi-"cation with the Surveyor General and took said "claim."

BRIEF AND ARGUMENT OF APPELLANT.

Now, may it please the court, we proceed to more fully show the *total insufficiency* of the answer of appellees to constitute a defense to this action, and the *singular findings* and opinions of the courts below in sustaining such a defense, and without reference to a single authority in support of its views.

THE MAIN ARGUMENT

Will be in regard to the allegations contained in the sixth separate answer and defense, upon which

the whole *defense is based.* We will first briefly review the other alleged defenses.

As to the general claim of appellees to be the owners in fee to the land in dispute. It must *turn* on the *sufficiency* of the sixth separate answer and defense to give such a title or any title.

I.

The first separate answer and defense, after admitting plaintiff's claim of title is based on deeds executed by Grant H. Short and the other heirs of Amos M. Short, in 1877 and 1878, to plaintiffs. Grantor Samuel R. Whipple alleges that at the date of the execution and delivery of each of said deeds, and all subsequent deeds under, by or through which plaintiff claims title, these defendants were, and for a long time prior thereto, had been in the actual, open, visible, notorious and exclusive possession of the whole of said premises, claiming and holding the same adversely against all mankind, and said deeds were and are, each and all of them, inoperative and void as against these defendants.

All this amounts to nothing, because the sixth separate answer and defense shows upon its face that this claim was not taken by Amos M. Short; that this land was *government land* until 13th October, 1877, and that the purchase and possession of appellees in 1865 was without authority of law, and that appellees knew, or had the means to know that their grantor had no title or *right* of *title* to this land. Therefore, appellees' purchase and possession lacked the ingredients of *legal ouster*, *good faith*, or *color* of *title*, and they could not *hold adversely.*

Jackson *vs.* Walters, 12 John R., 365.

In view of the allegations of the answer of defendants below, they must be presumed to have known at the time they purchased and improved that their title was a *nullity.*

"A *deed* or judicial proceeding which is a *nullity*, "can never lay the foundation of an *adverse* possession. And if these appellees, without the deed, had "no right to the possession, they secured no right by "a deed or judgment given without authority. It "follows that possession under their deed was not, "and could not be *adverse*."

Livingston ~~Price~~ Iron Co., 9 Wendle, 512.

Lincoln *vs.* Tower, 2 McLean, 437.

1 Pa., 55; 33 Cal., 318 and 674.

It cannot be claimed that the *Probate* Court of Clarke county had any *power* to *invest* any one with *title* in this land in 1856, or any time, and that is just what was attempted. and unless these appellees can show title through a *court* having *jurisdiction*, their possession is of *no value*.

Walker *vs.* Turner, 9 Wheaton, 174-178.

The disposition of *title* to land is the prerogative of the government.

THIRD AND FOURTH.

The third and fourth separate answers and defenses are pleas of the statute of limitations.

As to whether either of these pleas is any defense in this case depends on the time the statute began to run against the patentees, from whom appellant claims title. It is clear the statute could not begin to run prior to an *investiture* of title 13th October, 1877, or to a clear right of title. By the allegation of this answer the statute could not begin to run against the Short heirs prior to the 31st day of July, 1874. See Traver *vs.* Tribou and Traver *vs.* Brooks, 8 Sawyer 520, wherein the court holds that the statute of limitations "did not commence to run against heirs (in "a donation claim) until the *division* of said claim "was made by the Surveyor General."

In this case the answer claims the 31st day of July, 1874, when that alleged *division* was made.

This suit was instituted on the 11th day of March, 1882.

This we submit as conclusive against the plea of the statute of limitations as plead by the answer, even if there was a donation land claim.

Now as to the demurrer and its waiver: Notwithstanding the general rule that pleading over is a waiver of the demurrer, still it should and does have its exceptions, especially where the whole record clearly discloses the fact (as in this case) not only that no facts are stated sufficient to constitute a legal or equitable defense, or to confer jurisdiction on a court of equity; but that by no possible amendment, in the very nature of the transactions upon which the defense is based, could facts be stated sufficient to constitute a legal or equitable defense, and that in such cases this court will not allow the rights of a party litigant to be frittered away upon honest or dishonest mistakes of counsel in an inferior court.

In the case of Teal *vs.* Walker, 111 U. S., p. 242, this court held "When the question arises as to "whether the complaint or answer states facts sufficient "to constitute a cause of action or defense and demur- "rer thereto being overruled or *waived*, the error is not "waived by pleading over, nor is it cured by verdict, "but is open for consideration".

THEREFORE

Notwithstanding the waiver and overruling of the demurrer to the amended answer, we will proceed to show the court the *total insufficiency* of said sixth separate answer and defense, and its utter failure to state facts sufficient to constitute a defense of any description.

The 6th separate answer and defense. The argument and authorities we shall present to show that the court below erred in entertaining it may be first generally premised as follows:

That when the allegations of the answer (as in this case) clearly discloses the fact that there are no facts stated that if true, are sufficient to constitute a legal or equitable defense—and when there is not a single allegation made which by the rules or principles of equity calls for or justifies the interposition of a court of equity or good conscience—and where by no possible amendment in the nature of the transactions upon which the defense is based could facts be stated sufficient to constitute a defense to this action, or clothe any court with authority to sustain such a defense, *then* the *demurrer* to the answer herein should have been sustained by the court below—and the court should of its own motion, regardless of any motion or *demurrer dismissed* this *answer* as "not stating facts sufficient to constitute a defense of "any description."

For the following reasons:

I.

That Amos M. Short never filed a notification with the Surveyor General nor took a donation land claim, and therefore his wife and children acquired no rights in the land through him at his death.

II.

That not only the title but the *right of title* prior to the 13th day of October, 1877, was in the United States, and there remained until patent issued in 1877.

III.

That the only notification for this alleged claim was made by Esther Short 9 months after the death of her husband.

IV.

That the alleged division of said claim into east and west halves in 1855, and the alleged partition of said west half among said children by the Probate

Court as the *real estate* of Amos M. Short in 1856, and each of their after *bargain* and *sale* deeds of partition allotments were *null and void*, because at the *time* they had no interest in the land either *contingent* or *vested*, to *partition*, *divide* or *sell*.

V

That in this case the Probate Court of Clarke County, W. T., had no *power* or *jurisdiction* to act at all, *even* if said *Short had taken said claim*, as the land would have been no part of his estate.

VI.

That the *after acquired* title of these heirs of Amos M. Short to this land could only *vest* under the allegation of this answer when the *patent issued*, because there is no *prior right*, *act* or deed of the patentees or Amos M. Short alleged in this answer to which it could *relate back to* or connect with.

VII.

That the sixth separate answer and defense nowhere alleges or sets up any ground for equity to sustain their claim of title, or create an estoppel against the Short heirs asserting their *after acquired title*. Nor does said allegations call upon or justify the interposition of any court of equity or good conscience in their behalf, hence there can be no estoppel either legal or equitable, in behalf of the appellants in this action.

ARGUMENT.

It will be readily seen by the allegations of the 6th separate answer and defense, which fully sets forth all that was done by Amos M. Short, or by any of the Shorts, or by the Probate Court—that, at the *time* of the death of Amos M. Short he was *no donee* of the United States under the Donation Act of 27th of September, 1850,

BECAUSE,

The answer does not allege that Amos M. Short had taken a donation land claim by filing a notice with the Surveyor General that he had or desired to take said claim, as *required* by the *6th Sec.* of the Act of Congress of 27th Sept., 1850, that he *shall* do.

But said 6th separate answer and defense, after much disingenious mixing of words and phrases about settlement, residence, cultivation,—claiming said land as their donation claim under the Donation Act of the 27th of September, 1850 (*two and a half years before the act passed*). Then admits and alleges the fact to be "That after the death of said Amos M. "Short, and on or about the 4th day of October, "1853, the said Esther Short caused to be filed in the "office of the Surveyor General at Oregon City, Or-"egon, the notification No. — aforesaid of said Amos "M. Short and Esther Short upon said donation land "claim, showing that said Amos M. Short was com-"petent to take the same."

2d.

This being the only alleged notice and *Esther Short* the only person who ever filed any notice with the Surveyor General for this alleged donation land claim, (the notice stating that she filed under the Act of Congress passed 14th February, 1853, amendatory of the Act of 1850,) can this filing of Esther be regarded as the act of her dead husband? Surely not

3d.

That the courts below were in error in treating this land as the "Donation land claim" of Amos M. Short at the time of his death is apparent, because the Donation Act provides "that all persons *failing* "to give *such notice* before the 1st day of December, "1853, shall be thereafter debarred from ever receiv-"ing any benefit under said 4th section."

And as the *answer* shows said Short *failed* to comply with the main condition *precedent* of the law, residing within 18 miles of the office of the Surveyor General at Oregon City for 27 months after the act passed before his death. Now, may it please the Court, can it be *assumed*, as the Supreme Court of the Territory assumes, "that all conditions of the "Donation act necessary and precedent to the pass- "age of title had been complied with, and the widow "and children held among them all disposable in- "terest in the land."

This fact being well known to the widow at the time (that her husband had *failed* to take a donation claim), accounts for and explains why she filed her notification of October 4th, 1853, under and by virtue of the 22d section of the donation act, approved February 14, 1853, under which she could file on and take 320 acres and no more.

The refusal or *neglect* of Amos M. Short to file on a claim in his life time deprived his widow and children of any interest in a donation claim through him, said Short. His *neglect* was their neglect. This Court has held "that the *settler must notify* "the Surveyor General of his claim, and otherwise "conform to the provisions of the act. His acts "affecting the claim are her acts; his *neglect* her *neg-* "*lect*. Whatever will bar her will bar them, the children."

Vance vs. Burbank, 101 U. S., 521.

The donation act does not *vest* the title in the donee until he has fully complied with all of the provisions of the act, including sections 6 and 7 of said act.

Hall vs. Russell, 11 Otto, p. 510.

6th.

The above decisions of the Supreme Court of the United States but follow the doctrine laid down in the case of Fitzpatrick vs. Dubois, 2 Sawyer, p. 435,

which lays down the doctrine "that neither occupancy, residence, or cultivation, however commenced "and prolonged, can bring a party within the purview of the act, so as to *vest* in him any interest in "the land. *Notice* to the Surveyor General was the "*first act* which brought the occupant within the operation of the law." The Court further says "that "this *notice* was what constituted him a *settler* under "the act, as well as in fact," and adds "without this "*notification*, the occupant could not acquire any "legal relation to the land."

Fitzpatrick vs. Dubois, 2 Saw. 435.

7th.

Now, may it please the Court, if the law of the land and decisions of the Circuit and Supreme Courts of the Government amount to anything, and are intended to control the decisions of inferior courts, what should become of the decision of the Supreme Court of the Territory of Washington in this case? And what was the *title* or *right of title* of Amos M. Short by the allegations of this answer at the *time* of his *death?* And what constituted the *title* or *right of title* of the children of Amos M. Short to the *west half* of this alleged donation claim in 1856, the time when the alleged partition proceedings took place, has not been discovered except by the Supreme Court of the Territory of Washington. We claim the decision of that court was wrong and should be reversed.

8th.

And now, if Amos M. Short, under whom these appellees claim was not *the donee* of this alleged claim at the time of his death in 1853, then the *rulings, findings* and *decisions* of the courts below are *wrong*, and the whole fabric of the defense at law and equity must fall to the ground and disappear.

NOTIFICATION OF ESTHER SHORT.

As to the notification of Esther Short after the death of Amos M. Short, what was its use or object, if said Amos had taken said claim, and was the *donee?* There could *be no object.* If Amos M. Short had in his life-time taken said claim, by filing for it his notice with the Surveyor General, then the widow would get her half under the law, and herself and children would have taken her husband's half under the law, without further notice, residence, or cultivation.

2d.

But if she filed the notification of Oct. 4th, 1853, to show that her husband was *competent* to take the same, as is alleged, her alleged notification was *absolutely void* for any purpose. The widow had no such *power* under the law. She could not cure her husband's *neglect*, nor clothe his children with any right in the land.

Vance vs. Burbank, 101 U. S. p. 521.

T'is true that Esther Short, after the death of her husband, Amos M. Short (he having *neglected* to take a claim) had the right, as a single woman (Silver vs. Ladd, 7 Wallace, p. 219) or by virtue of section 22 of the Donation Act, passed 14th of February, 1853, to file her notification on any public land in Oregon Territory for 320 acres as a donation land claim for herself, and no more. But in this case she is alleged to notify on 640 acres, simply to cure the neglect of her husband. Could she do it? Surely not.

4th.

Viewing the *allegations* of the *answer* in the light of the authorities submitted, it is apparent that at no time during all the alleged transactions (prior to the issue of the patent) had the children of Amos M. Short any interest in this land. If this be true, the

appellees could not acquire any interest in this land by a purchase from any of the Short heirs, before they had any interest in the land to sell, nor while it was the lands of the United States. By their purchase, appellees got nothing but possession of government land, by a guardian's sale of the *interest* of Grant H. Short, who had nothing in the land but an *assumed* possession, and that possession without any *right* whatever. And these appellees *knew all this*, or had the *means* to know that by their *purchase* they could acquire no title to the land whatever

RELATION BACK.

We will now call the attention of the Court to the doctrine of relation back.

In view of the allegation of the answer in this case, it is apparent that the doctrine that the patent when issued to the Short heirs in 1877 could relate back to and take effect at any date anterior to its issue (or at most, the 31st day of July, 1874) is surely not tenable in this case. Because—

1st.

No *grant*, no *deed*, no *patent* can on its issue relate back and take effect at a time anterior to its date, except where certain prior acts are required to be done as a condition precedent by the grantee, and when fully performed by him; then, in such cases, the grantee is by law entitled to the issue of the patent by his *prior act*; and when issued in such cases, it then relates back to and connects with that prior act or deed of the grantee that gave him the right of title. The grantee having the right of title by full performance of the conditions precedent, then the patent when issued in such cases relates back to and connects with the act that gave him the right of title.

2d.

But in this case the *answer shows on its face* that Amos M. Short did no act, performed no condition precedent that *under the law* entitled him to any right to this land as a *donee* under the act of Sept. 27th, 1850.

But the answer does allege and show that another party, after the death of said Short, took this claim by filing with the Surveyor General of Oregon the only notice that ever was filed for it; and as this patent could not take effect in Amos M. Short, deceased, but as said patent did also issue to his heirs in 1877, being these ten children, without *prior right*, it could not relate back to and connect with or *take effect* at any time or date *anterior* to its issue, seems perfectly clear.

3d.

As occupation, residence, and cultivation for any time never has alone clothed any one with a right as a *donee* under the act of Sept. 27th, 1850. It could not relate back to said residence and cultivation as sufficient. See 2 Saw. supra 435. 101 U. S. 510 supra.

4th.

Nor could the patent issued to the Short heirs in 1877 *relate back* to or connect with any right by virtue of the alleged notification of Esther Short in October, 1853. For it is clear that she had no *right* or *power* under the law to file a notice for any one but herself *dead* or *alive*.

Vance vs. Burbank, 101 U. S. p. 521.

5th.

There is no *event*, or *act*, or *deed*, or *right* that is set forth or alleged in the *answer*, or was proven, or *ever existed* upon which the patent can *relate back to* or connect with.

Therefore, upon its issue in 1877 the *title* and the *right of title* of the patentees did *first vest* in them, seems to us legally and logically clear, and must be regarded as a grant of title "*ex donation regis*," and did then *first invest* these children or heirs with the *title* to this land.

AGAIN,

By the allegations of the *answer*, it is clear there was no *obligation* on the land office to issue the Certificate No. 275, dated July 31st, 1874.

Prior to the issue of that certificate in 1874; this west half was *Public land*, and the assignment therein made was the *first event* that had taken place that gave to these children or heirs even a contingent interest in the land.

2d.

Prior to 1870, these heirs had sold and quit-claimed, each his and her allotment as set apart to them by the *Probate Court*, being portions of public land as the *real estate* of their father. Such deeds could not convey to the purchasers any title, nor could they convey an *after-acquired* title not provided for by the terms of the deeds themselves.

3d.

But on the 13th day of October, 1877, the United States conveys this land to the heirs of Amos M. Short deceased; at which time these heirs were *first invested* with a *right* and *title* to this land. And in 1878 these patentees sold and conveyed each his or her undivided interest in the whole land to appellants grantors, as is admitted in the answer of defendants below—Record p. 2 1st sep ans & defense

4th.

And neither these appellees nor any other person has any right to complain unless it be the government itself; and it is not here complaining, and should

it think there has been any fraud or illegal act on the part of the patentees, the courts are ever ready to try the question by the proper action. But until then, and until successful, the only title to the land in dispute is in the appellant in this action. Therefore we claim that the ruling, findings, and judgment below should be reversed.

THE EQUITIES OF APPELLEES.

As the courts below in this cause have discovered equities in this sixth separate answer and defense in favor of these appellees so strong as to give them a judgment on the ground of *Equitable Estoppel*, we will now consider that question and see if any grounds for the enforcement of the estoppel can be found alleged in this sixth separate answer and defense—or to which any possible evidence could have justified an estoppel. Let it be borne in mind that this separate answer and defense sets out fully all that was done by Amos M. Short, living, and by Esther Short after his death; and by the children and by the *Probate Court* of Clarke County, W. T., in regard to this land claim.

I.

Under the assumption that Amos M. Short was the *donee* the appellees claim to deraign the right of title through an alleged *Probate Court partition proceedings* of 1856, of this land claim as the *real estate* of Amos M. Short deceased—being the same land that was included in the notification of Esther Short as her donation land claim—taken nine months after the death of her husband, Amos M. Short. All these facts are set out in full by these appellees in their sixth separate answer and defense to sustain what they seem to regard as the legal and equitable inception of their title.

II.

But in attempting this they are compelled to set up all the illegal and void acts and doings of the Probate Court, themselves. and others in regard to this alleged land claim, as the only grounds on which their assumed legal or equitable rights are based. We admit they have one high authority. St. Paul says, in Romans, 5th and 20th, "But where sin "abounded, Grace did much more abound." This must be their hope.

III.

For the *argument* let us assume this land was the claim of Amos M. Short at his death in January, 1853. How could it accord with the fact *alleged* in the 6th separate answer, that said claim was taken and filed on, nine months after his death by Esther Short; showing that said Amos M Short was competent to take the same—(as many others were).

I.

Would such a notification after his death by another party divest the United States of title and so transfer the title of said land to the dead Short as his *real estate* to be divided among his heirs?

This answer so assumes:

II.

Had this been his claim as assumed; on his death his wife and children would have been his successors under the law as *donees* of his half, and it was not subject to the control of his administrator or the Probate Court—for it was no part of his *estate*—nor could any partition or sales be made of his half prior to the land being divided and his half set apart to him by the land offices in 1874. Prior to which there could be no investiture of title.

III.

If Amos M. Short had been the *donee* of this al-

leged land claim, the *title* of his widow and children to his half would have been uncertain and unknown until divided and set apart to him by the land offices. Prior to which no partition, either judicial or by parol, could take place that would be binding.

IV.

And as neither the administrator nor the Probate Court had any *power* or *jurisdiction* to make said partition of 1856 or at all—it follows that said alleged partition proceedings—were absolutely *null* and *void*, and cannot, and does not, bind any of these heirs or their assigns from asserting their *after-acquired* title of 1877; were there no question about said Short having been the *donee*.

Statutes of W. T., 1854, sec. 3, Hannah *vs.* Silver, 2 Oregon, 336.
8 Saw, 511–520.
16 Wendle, 316.

5th.

Nor can the alleged *deeds* of bargain and sale (by each of these children) of his or her said partition allotment transfer by the estoppel—a greater interest in the part conveyed than the heir or child owned at the time in the land thus conveyed—and in this case, that interest could have been in no event but an undivided one-tenth interest therein; even if *Amos M. Short was the donee* of said claim at his *death*—because the alleged partition proceedings of the *Probate Court* of this alleged land claim in any event were *absolutely null* and *void* and bound no one.

But if said Short was *not* the *donee* at his death, this west half of said alleged claim was *public land* of the United States, during any and all of said alleged sales—and they, therefore, conveyed *no right* or *title* at law or equity to anyone.

NOW WHERE ARE THE EQUITIES OF APPELLEES?

Let us see if any grounds for equity is alleged or pleaded in this 6th separate defense. If so in what do they consist? Wherein do these appellees claim to have been *misled*, *deceived*, or *imposed* upon by any one. They make no allegation of *fraud* or *deception*, or of being misled by the *Short heirs*. They nowhere plead *ignorance*, or want of information on their part at the time they bought. But this separate answer and defense shows throughout *full knowledge* of *all* proceedings, acts and things that had been done by the Shorts and by the *Probate Court* in regard to this *land* and *allege* the same as the foundation of their title. Therefore there can be *no estoppel*.

2d

There can be found no reasons, or grounds alleged or set forth in this separate defense, on which any equities can be predicated, or on which any court of equity can afford relief: Because the answer simply and plainly shows that these appellees sought with their *eyes wide open* to get possession of land from those that at the time they *knew*, or had the *means* to *know* had *then* no right, title or interest in the land.

It is a clear case of *caveat emptor*. Their deception was *self imposed*. If deluded, they deluded themselves. If they sustain loss, it is the result of their own carelessness or neglect. Of their want of title they were informed by statute law, and the *record* in the United States Land Office. Therefore we claim that the court below might, and should of its *own* motion, regardless of any *motion* or *demurrer* dismissed this *answer* as "not stating facts sufficient to constitute a defense to this action," as it utterly fails to show appellees entitled to equities at all.

See Teal *vs.* Walker, 111 U. S. p 242.

THE DOCTRINE OF EQUITABLE ESTOPPEL

This doctrine, salutary as it often is, cannot apply to an answer or case like this. The appellees in this case can claim no equities, nor can they enforce an estoppel against the Short heirs, or their assigns, asserting their legal title to this land, on account of anything they are alleged to have done *before* they *acquired* a *right* of *title* in the land. And there can be no estoppel by *bargain* and *sale deeds* of one's right, title and interest in lands except the interest the party *then owns*, and a *warranty* cannot enlarge it, because the estoppel cannot be extended by implication to an *end* which is not provided for in the *deed* when executed. See

Coaky v Perry. 3 Ohio, U. S. 344.
Hanrick *vs* Patrick U. S. R. 119 P 175

In the above case decided by this court at its last term. It was held in regard to a covenant of general warranty. "That where the estate granted is the present interest and title of the grantor. It does *not* operate as an *estoppel* to pass a *subsequently* acquired title."

That when the deed does not on its face purport to convey an indefeasible estate, but only the right, title and interest of the grantor. The doctrine of *estoppel* has been held not to apply.

White v Brocow 14 Ohio St. 343.
Adams v Ross 30 N. J. law 509.
Blanchard v Brooks 12 Pick 47
Brown v Jackson 3 Wheat 452

ACTS AND CONDUCT.

Nor can there be any estoppel against the legal owner of the land for words, acts, conduct, acquiesence, or for anything said, done, or allowed before his *title became vested*—hence a partition, a deed of quit-claim, of bargain and sale of Government land

prior to having the title or right of title—could pass no title, much less could pass an *after acquired* title, in law or equity, or by the estoppel. See

Baylor v. The Commonwealth, 4 Wright, page 37.
Smith's Leading Cases, 2 V. P. 734.
6 McLean, 3. 12 Pick 47–66.
7 Peters, 222.

II.

We readily admit that the doctrine of equitable estoppel, when applicable, will often preclude the owner of realty from asserting his title, to the *injury* of and against an *innocent* party, holding under a supposed good title, and *not knowing of*, nor having the *means* of *knowing, the invalidity* of his own title, is a well established principle of courts of equity, and should be enforced.

III

But in this case the doctrine is not *applicable* at all, because the children of Amos M. Short had no title in this land to partition in 1856, or to *maintain, assert, or sell*, and all prior purchasers either knew, or had the means to know, the *condition of the title.*

IV

ITS APPLICATION.

That the doctrine of equitable estoppel may be justly applied against the legal owner of land, courts of equity have laid down certain rules, creating what is called the *essential elements* of an estoppel, which must *first exist* before it can be made applicable to a given case.

Before this doctrine can *apply* in regard to the *title to land*, it must appear from the *answer and evidence.*

First—That the party claiming the benefit of the estoppel was at the time of his purchase and improvement ignorant of the invalidity of his own title.

Second—That he had no available means to find it out: and

Third—That he was in some way misled and deceived by the party sought to be estopped. See

Wythe v. Smith, 4 Saw., 24 88.

Hill v. Epley, 31 Penn. St. 34.

Bogs v. Merced Co., 14 Cal., 367.

Steel v. Smelting Co., 106 U. S. P., 456.

Henshaw v. Bissell, 18 Wall, 255; 93 U. S., 326.

Pomeroy Equity Jur., 2 vol. par. 806–807.

This answer does not show or make a single allegation of this kind, and there was no such evidence, or finding.

V

If misled or deceived, he must allege it to prove it, and claim that it was not the result of his own fault, his *own neglect* or *laches*, because, if he deceives himself, he *estops* himself from claiming an estoppel. For it is held in the case of Trenton Banking Co. vs. Duncan, 86 N. Y., Court of Appeals, 221, that no estoppel in pais can be found against the legal owner of land, unless the party sought to be estopped was guilty of fraud or negligence equivalent to fraud, and the party claiming the equity of estoppel must be *free* from all imputation of *lacees* in acting in the belief of ownership.

Nor can a party claim the benefit of any kind of estoppel when it is apparent from the *answer* that he *knew*, had the *means* to *know*, or was equally well informed at the time of the want of title, or the *character* of the title. See Steel vs. St. Louis Smelting and Refining Co., 106 U. S., 447; Smith vs. The M. Ins. Co., 12 Harris, 220; The Comyth vs. Naulty 10 Barr, 527–531; 6 Seldon, 42.

SILENCE, ACQUIESCENCE, RATIFICATION.

All this amounts to nothing. Their bargain and

sale deeds of their right title and interest in this (Public Land) was but a surrender of the possession. Their deeds did not convey further assurance of title to be acquired from the government, nor warranty of that title. Their deeds were but a quit claim, each of his and her right title and interest at the time in the land described by virtue of the alleged *Probate Court* partition proceedings. They acquiesced and ratified for many years all they had disposed of, the possession. They acquiesced in that possession because they had no title to assert or claim before 1877, and they had no reason to expect it. The appellees could easily have secured a title to this land from the government at any time before 1877, but they did not. It so happened that in 1877 the government conveyed this land to plaintiff's grantors.

Surely there was nothing to prevent them from receiving it, and what was there to prevent them from asserting their *after acquired title* when they received it. Can the *quit claim*, or *bargain* and *sale deeds* of these *Probate Court partition allotments*, before they had any title, estop them in equity from asserting their *after acquired* title. We think not.

Can their alleged silence, acquiescence, and ratification of the possession of government land in which at the time they had no claim of title *estop* them in law or equity from receiving and asserting an *after acquired title* from the government? Certainly not. No one is required to assert his title before he has it.

Bigelow v. Toplief 25 Vermont 273.
Hill v. Epley 7 Casey 331.
Fisher v. Mosman 11 Ohio, No., 42.
Crest v. Jack 3 Watts 238

II

In this case the alleged equitable defense shows that the appellees, defendants below, knew as much,

if not much more of the character of the title of the minor, Grant H. Short, to this land, than it can be supposed he knew. Nor does the answer claim or allege that appellees were deceived or misled in any way by the minor, his guardian or by anyone.

Chief Justice Shaw in Gray v. Bartlet 20 Pickering, 186, holds. That "Equity only applies in favor of a party holding by rights not equally open to the parties, and who has been deceived and misled by the want of notice. These appellees in their answer plead full knowledge of all that had transpired in regard to this land. Therefore they allege *no equities.*

III

Duty to Speak.

It is well settled that no *equitable* estoppel can spring from mere silence, or acquiescence in any case unless it was "*a Duty to Speak.*"

Hall v. Epley 7 Casey 331

Taylor v. Ely 25 Con, 250.

Strong v. Ellsworth 26 Vert. 362.

Sutton v. Wood 27 Minn. 362.

But that *duty* can only exist after the title has become *vested,* in anyone. In this case these heirs (appellants grantors) asserted their title as soon as received.

And it is held that silent acquiescence never works an estoppel short of the running of the statute of limitations unless it works a fraud on an *innocent party* and misleads him to his injury, as was held in the case of Wendle v. Van Rencelier 1 Johnson Ch. 344, where the claimant held a *secret deed* 14 years *knowing his title* and suffered a party to purchase and expand money on the land under an erroneous opinion of title. In such cases equity should interpose and protect innocence, against such palpable fraud. But there can be no fraud or deception, in a case like

this, where all the parties interested were *equally* informed of all the facts and acted on them, nor can there be an *estoppel*. 27 N. Y. 310. The answer alleges no deception, hence there can be no *estoppel equitable* or *legal* in this case. Therefore all this claim about *silence, acquiescence* and *ratification* falls to the ground.

Now, what could pass by said deeds of partition allotments?

We admit the general principle to be that if any person who in terms conveys land, or any specific interest in land—with warranty of title—and does not own it and afterwards acquires the same land or specific interest, such acquisition inures to the benefit of the grantee; the warranty being only co-extensive with the estate, right or interest which the deed purports to pass.

But if the deed is but a *quit-claim*, or *bargain and sale deed*, and is limited to the right, title and interest of the grantor at the time of its execution. (As all these deeds were conceded to be by the court below), even the receipt of the proceeds of the sale cannot preclude the assertion of an *after-acquired title*; because any other construction would violate the character of the estate conveyed by the deed.

See Smith's leading cases, 2d Vol., page 737.

Also Herrick *vs.* Patrick, Fed. Rep'r. 13, Dec. 1886.- 119 U.S. R P 175

In this last case this court most fully sustains the above doctrine.

Alleged Deeds Not Binding.

As the Short heirs, in 1856, had no interest in the land in dispute, and as the Probate Court had no power to make the alleged partition of 1856, it follows that the alleged deeds of *bargain and sale, or quit-claim*, of said heirs, could pass nothing

but an assumed possession, and that possession without authority; nor could the deeds pass an *after*-acquired title by estoppel, unless the deed or deeds alleged conveyed *future estates*, or *titles to be acquired.*

See Varick *vs.* Edwards, 11, page 289.

Edwards *vs.* Varick, 5 Dinio, 664.

II.

It has been held that a deed of lease and release does not pass a *contingent* estate by the estoppel, nor estop the grantor from denying that it had passed Sir Edward Sugdon held that a subsequent estate would not pass by the estoppel of a prior conveyance.

Lloyd *vs.* Lloyd, 2 Connor & Lawson, 592; Drury & Warren, 369.

It is well settled on principle in this country and in England, that a *grant, release,* or bargain and sale *deed,* does not bind or transfer *future* or *contingent* estates by estoppel.

III.

Thus it has been often and repeatedly held in New York, and would seem plain on principle, that an estate acquired after the execution of a *deed,* will not pass by its operation *as such.*

1 Comstock, 242-6.

Jackson *vs.* Wright, 14 Johnson, 139.

Jackson *vs.* Bradford, 14 Wind., 622.

IV.

This doctrine of the estoppel is highly penal in its character, and should not, and can never be enforced unless all the circumstances concur, which are necessary to the creation of an equitable estoppel.

Bogs *vs.* Merced, 14 Cal., 279.

Crest *vs.* Jack, 3 Walls, 238.

Steel *vs.* Smelting Co., 106 U. S., 456.

And it is universally held that no equities are created, and no estoppel can be enforced against an *after-acquired title*, based upon a *quit claim* or *bargain and sale deed*, executed at a time when the grantor had no disposable interest in the land.

EXECUTORY OR CONTINGENT INTERESTS.

It has been held that no executory or *contingent* interest can be conveyed, either by common law grant or by the statute of uses.

Paletreau *vs.* Jackson, 11 Wendle, 110.

Jackson *vs.* Waldron, 13 Wend., 178; 5 Dinio, 665.

The same rule prevails in Massachusetts and most of the other states of the Union. As authority we refer to

Davis *vs.* Hayden, 7 Mass., 237.

Blanchard *vs.* Brooksdal, 12 Pick, 47-66.

Ham *vs.* Ham, 2 Shipley, 351.

Kinsman *vs.* Loomis, 11 Ohio, 475.

Frank *vs.* Dorst, 14 Ill, 304.

And many of these cases decide not only that the conveyance did not operate to pass the estate, but that it will not *debar* the grantor and *those claiming under him* from recovering the land at some subsequent period.

The law was so held in Jackson *vs.* Hubble, overruling contrary rulings, and has been followed in

Blanchard *vs.* Brooks, Comstock *vs.* Smith.

Sparrow *vs.* Kingman, 1 Comstock, 242.

Bell *vs.* Twilight, 6 Foster, 101.

And virtually affirmed in Baylor *vs.* The Commonwealth, 4 Wright, 37.

Thus we see if Amos M. Short had taken this claim his half could not have been known, was *uncertain* and *contingent* until set apart to him in 1874.

II.

The mere fact of assuming to convey land by bargain and sale, will not preclude the party by whom the deed was executed from showing that he had *nothing in the land at the time* on which the deed could *operate or feed.*

Sparrow *vs.* Kingman, 1 Comstock, 252-246.

The above principles are illustrated by the case of Peletreau *vs.* Jackson, 11 Wind., 110-13. id. 178, where it was *finally and authoritatively decided,* after a long and protracted litigation, that "the grant of an "*executory or contingent* estate is *devoid of all effect,* both as a conveyance and as an *estoppel.*"

THE TITLE MUST BE VESTED TO PASS.

It is well settled at the present day that a bargain and sale or lease and release must fail of effect unless the bargainor or releasor has a *vested* estate or interest on which the release can *operate or feed.* 4 Wright Supra, 37. In Doe *vs.* Scarborough, 3 A. & E., 2, such a deed cannot *pass* a *contingent* estate by estoppel, or *estop* the grantor from *denying* that it did pass. And in the case of Chew *vs.* Barrett, 11 S. & R., 389, Gibson, Judge. that in every conveyance to uses, the bargainor must be *seized* of the legal estate at that time, and if granted *before the title has vested,* it but passed an equity to the extent of the after-acquired interest of the grantor. If he gave further assurance of title to be acquired.

But to authorize *chancery* to extend the operation of an anterior conveyance to a subsequent title, it *must* appear *distinctly* that it was so *intended.* and not *limited* to the interest of the grantor at the *time* when it was executed.

The deed of appellees was executed by guardian and conveyed the right, title and interest of Grant H. Short in the land in dispute nine years before any interest became vested in him, and was done as the

deed recites, by virtue of the *Probate* Court partition proceedings of 1856.

II.

A covenant in a deed of partiton (and there was nothing of the kind here) will *prima facia* be limited to the estate which the parties have at the *time*, and seek to divide, and will not *bind* or *pass* an *after-acquired title.*

Doane *vs.* Wilcox, 5 Gray, 328.

Rector *vs.* Waugh, 18 Missouri, 13-26.

Nor will a special warranty against the grantor operate by way of estoppel on a *future interest.*

Comstock *vs.* Smith, 13 Pick, 116.

Wright *vs.* Shaw, 5 Cush., 56-64.

In Conclusion.

It must be admitted if the allegations of the sixth separate answer and defense are insufficient to constitute a defense to this action, there can be nothing else alleged in said amended answer on which a defense can be predicated either at law or equity.

1st.

It is alleged "that Amos M. Short and wife settled "upon this land in 1848; claiming the same as their "donation land claim, under the provisions of the "Act of Congress, approved September 27th, 1850."

This amounts to nothing except as to date of said Short's entry on the land.

2d.

It is alleged that thereafter "the said Amos M. "Short and Esther Short resided upon and culti- "vated said donation land claim from March, 1848, "up to the time of the death of him the said Amos "M. Short in January, 1853."

Not a word about said Amos M. Short having filed his notice with the Surveyor General (as required by law) and thus taking said land as his donation land claim, because he did nothing but cultivate portions of said land until his death.

3d.

The next allegation of said sixth separate defense is as follows:

"That after the death of said Amos M. Short, and "on or about the 4th day of October, 1853, the said "Esther Short caused to be filed in the office of the "Survey or General, at Oregon City, Oregon, the noti- "fication No ....., aforesaid of said Amos M. Short "and Esther Short upon said donation land claim, "showing that said Amos M. Short was competent to "take the same."

Does the above allegation make this the notice of and claim of Amos M. Short? Or is it not the *notice* of and the *claim* of Esther Short taken after the death of her husband, as alleged, because of the neglect of her husband?

4th.

The next step on the part of the widow and some of the children was "to agree to divide this land be- "tween themselves in 1855, as alleged; the children "take the west half and Esther Short the east half."

5th.

The next step was the alleged *Probate Court* partition proceedings of 1856 of the west half among the ten children as the *real estate* of Amos M. Short, deceased. And their subsequent sales each of his and her right, title and interest in his and her separate partition allotment of 1856, prior to 1870 as alleged.

6th.

That not until 1874 was said west half set apart by

the register and receiver to Amos M. Short, and a patent to said west half was issued to said Short and to his heirs, Oct. 13th, 1877.

Upon these allegations appellees claim the legal and equitable title to the land in dispute.

APPELLANT CLAIMS

1st.

That the allegations of the sixth separate answer and defense shows on its face that the title and *right of title* of the west half of said alleged claim was in the United States until the 13th day of October, 1877.

2d.

That this west half including the land in dispute was no part of the *real estate* of Amos M. Short, deceased, in any event.

3d.

That the Probate Court of Clarke County, W. T., had no authority, *power or jurisdiction* to make partition of the land at all; among any parties, had the land been a donation land claim,

4th.

The alleged heirs had no right or power to make any kind of partition prior to *investiture* of title.

5th.

The alleged Probate Court had no *jurisdiction* to act at all, hence the whole proceedings were *corem non-judice* and absolutely void.

Statutes of W. T., 1854, p. 309, sec. 3.

Hannah *vs.* Silver, 2 Oregon, 336.

Cutting *vs.* Cutting, 6 Saw., 396.

THEREFORE,

Appellant claims the total insufficiency of the allegations of the answer to constitute a defense of any description.

TEST OF TITLE.

Under the allegations of this sixth separate answer the question arises, when did the United States become divested or estopped from making any disposition it might choose to make of this land to other parties.

1st.

Was it at the time of the death of Amos M. Short, in January, 1853? Certainly not.

2d.

Was it at the time of the notification of Esther Short in October 1853 to cure the neglect of her deceased husband? Most assuredly not.

3d.

Or was the government estopped when, in 1855, the widow and children verbally agreed to divide the land into east and west halves? Or was it by virtue of the alleged Probate Court partition proceedings of 1856? Or the subsequent *bargain and sale* deed of each separate partition allotment, from 1857 to 1870? Surely neither.

Or was the government estopped when, on the 13th day of October, 1877, it issued its patent, and thus conveyed its title by its own mistake though it be; or it may be "*ex-donation regis*" to the heirs of Amos M. Short. *Then* and not till *then* was the government first divested of its title, and the Short heirs were *first* clothed with any right or title to this land. For it has been held that such matters as are set out in the sixth separate answer and defense could not estop the government in any disposition of the land it might choose to make.

Steel *vs.* Smelting Co., 106 U. S., 456.

THEREFORE,

These appellees got nothing by their purchase.

Nor could they secure any interest in the land in dispute by a guardian's deed executed long prior to his ward's *investiture* of title, and while the title and right of title was still in the government.

Morehouse *vs.* Phelps, 21 How., 294.

Farmer's Loan & Trust Co. *vs.* McKinney, 6 McLean, 1.

Simpeyreac *vs.* United States, 7 Peters, 222.

Blanchard *vs.* Brooks, 12 Pick., 47-66.

Now, may it please this Honorable Court, In view of the total *insufficiency* of this whole answer to constitute a defense to this action, with the alleged steps resorted too, to secure possession of public land then claimed by ignorant minors and orphans as the real estate of their father, followed by the alleged Probate Court partition proceedings of 1856, and the after bargain and sale deeds of said alleged partition allotments. Without title or right of title to *purchasers* who *knew* all the facts, or had the *means* to *know* that, at the time, they were but getting possession of *public land*. We now submit if the answer of appellees alleges or sets forth any fact, any ground, sufficient to constitute a defense to this action.

Wherefore appellant asks for a reversal of the findings, ruling, and judgment, rendered in the court below.

LEANDER HOLMES,
Attorney for Appellant.

124-495

No.....

IN THE

SUPREME COURT

OF THE

United States.

JOHN W. BRAZEE, Appellant,

VS.

NICHOLAS SCHOFIELD

AND

MARY SCHOFIELD, Appellees.

BRIEF AND ARGUMENT OF APPELLEES.

B. F. DENNISON, *Attorney for Appellees.*

RUFUS MALLORY, of Counsel.

VANCOUVER, W. T.:

THURSTON DANIELS, BOOK AND JOB PRINTER.

1885.

SUPREME COURT

OF THE

UNITED STATES.

JOHN W. BRAZEE,
Appellant,

vs.

MARY SCHOFIELD,
AND
NICHOLAS SCHOFIELD,
Appellees.

MOTION TO DISMISS.

son

1. Because "a statement of the facts of the case in the nature of a special verdict" is not "made and certified by the court below," as required by the Act of Congress, approved April 7, 1874, (Statues at Large, Vol. 18, page 28.)

Nor did the Supreme Court of Washington Territory affirm in its judgment any findings of the District Court.

Eilers v. *Boatman*, 111 U. S., 356, and cases therein cited.

2. Because it does not appear that *all* the findings of the District Court are contained in the transcript, nor that all of the proceedings in said Court are contained in the transcript.

3. Because it appears affirmatively from the transcript and the certificate appended thereto that said transcript does not contain all the proceedings, nor all the evidence which was before the court below.

B. F. DENNISON,
Attorney for Appellees.

RUFUS MALLORY, of Counsel.

No......

IN THE SUPREME COURT

OF THE

UNITED STATES.

JOHN W. BRAZEE,
Appellant,

vs.

NICHOLAS SCHOFIELD,
AND
MARY SCHOFIELD,
Appellees.

MOTION TO DISMISS.

Appellees move to dismiss the appeal for the reason [illegible]

1. Because "a statement of the facts of the case

appellee's move to dismiss the appeal for the rea-

son [illegible]

No......

IN THE SUPREME COURT
OF THE
United States.

JOHN W. BRAZEE,
Appellant,
vs.
NICHOLAS SCHOFIELD
AND
MARY SCHOFIELD,
Appellees.

Appellees move to dismiss the appeal for the reason [illegible]

Should the findings of the District Court be considered as *affirmed* by the Supreme Court of the Territory and the case be heard thereon, counsel for Appellees submit the following

BRIEF AND ARGUMENT.

Express and Implied Findings of Fact by the District Court.

Territory of Washington,
County of Clarke. } ss

In the District Court of the Second Judicial District of Washington Territory, holding terms at Vancouver for April Term, 1882:

JOHN W. BRAZEE,
Plaintiff,
vs.
NICHOLAS SCHOFIELD
AND
MARY SCHOFIELD,
Defendants.
} **Findings.**

1. Was Grant H. Short and the other heirs at law of Amos M. Short, each and all of them, out of possession of the land in controversy at the time they executed and delivered their deeds to Samuel R. Whipple in 1877 and 1878?

Yes.

2. At the time said deeds were executed and delivered to Samuel R. Whipple, were the Defendants, or either of them, in the exclusive and adverse possession of said land?

Yes.

3. In what year did Grant H. Short become twenty one years of age?

In 1866.

4. Was the Defendant, Nicholas Schofield, continuously in the exclusive and adverse possession of the lands in controversy from April, 1865, until he conveyed the same to the Defendant, Mary Schofield, in November, 1872?

Yes.

5. Has the Defendant, Mary Schofield, been continuously in the exclusive and adverse possession of said lands since November, 1872, until the present time?

Yes.

6. Was Grant H. Short in the exclusive and adverse possession of the land in controversy by Guardian from the time of the

alleged partition in 1856 until the sale thereof by his Guardian in 1865?

Proof does not shew.

7. Was the alleged Guardian's sale of the land in controversy made for the purpose of paying "*the just debts*" of Grant H. Short and of furnishing him with "*necessaries?*"

Yes.

8. Has Grant H. Short, or any person claiming under him, at any time returned or offered to return any part of the purchase money paid by Nicholas Schofield to the Guardian of Grant H. Short for the land in controversy?

No.

9. Has Grant H. Short, since coming of age, or at any time, done any act, indicating his intention to disaffirm the sale or deed made by his Guardian in 1865 to Nicholas Schofield, other than making the deed to Samuel R. Whipple, dated March 16th, 1878?

No.

10. What is the value of the improvements put upon the land in controversy by the Defendants since April, 1865?

$2,000.

11. What amount of taxes have the Defendants paid on said land since April, 1865?

Twenty dollars each year.

12. What was the value of the land in controversy in 1865? $800 gold. Also its present value? $7,000.

13. Have any of the heirs at law of Amos M. Short done any act at any time indicating his or her intention to disaffirm or not to be bound by the alleged partition made in 1856 other than making their deeds to Samuel R. Whipple in 1877 and 1878?

No.

14. From the time said partition was made in 1856 until the making of their deeds to Samuel R. Whipple in 1877 and 1878, have each and all of said heirs acquiesced in said partition as made and held and claimed in severalty the portions allotted to them according to said partition?

Yes.

15. How much of the $785 paid by Schofield for the land pur-

chased at the Guardian's sale in 1865 was applied to the payment of the just debts of the minor Grant H. Short and for his support and maintenance?

The whole.

16. Was owelty paid or secured to the several heirs entitled thereto for the purpose of equalizing the partition as made in 1856?

Yes.

17. In what year did Esther Short die?

About 1862.

18. Did the heirs who were minors in 1856, after becoming of full age, adopt the partition as made and assented to by their Guardians in 1856?

Yes.

19. Had Grant H. Short, before and after attaining his majority, notice of the proceedings in the Probate Court affecting his real estate?

Yes.

20. Has Grant H. Short known all along since 1865 that Schofield was in possession of the land in controversy, cultivating and improving the same?

Yes.

21. Were the proceeds of the Guardian's sale applied to the use and benefit of Grant H. Short?

Yes.

22. Were the proceedings in partition—report of Commissioners,—survey and plat recorded in Auditor's office of Clarke County, in October, 1856?

Yes.

23. Has the Plaintiff "*a valid, subsisting interest*" in the land in controversy, within the meaning of Section 536 of the Code?

Findings as to Conveyances made in Accordance with the Partition.

1. Did Henry C. Morse and Samantha, his wife, in 1857, sell and convey to David Parker the lot of land designated in the alleged partition proceedings in 1856 as Lot 1? (No. 1.)

Yes.

2. Did J. P. Shockley and Jerusha, his wife, in 1858, sell and convey to Esther Short the lot of land designated in said partition proceedings as Lot 2? (No. 2.)

Yes.

3. Did Henry S. Burlingame and Druzilla, his wife, in 1865, sell and convey to Samuel R. Whipple the lot of land designated in said partition proceedings as Lot 3? (No. 3.)

Yes.

4. Did Amos C. Short and wife, in 1859, sell and convey to Leander Holmes the lot of land designated in said partition proceedings as Lot 4? (No. 4.)

Yes.

5. Did Maxey B. Short, in 1867, sell and convey to William Ranck and wife the lot of land designated in said partition proceedings as Lot 5? (No. 5.)

Yes.

6. Did Alfred D. Short, in 1864, sell and convey to Julius Suiste the lot of land designated in said partition proceedings as Lot 6? (No. 6.)

Yes.

7. Did Grant H. Short and wife, and Curtis F. Short as Guardian of Grant H. Short, in 1864, mortgage to George Beatty for $200 the lot of land designated in said partition proceedings as Lot 7? (No. 7.)

Yes.

8. Did Curtis F. Short as Guardian of said Grant H. Short, in 1865, sell and convey to Nicholas Schofield the lot of land designated in said partition proceedings as Lot 7? (No. 7.)

Yes.

9. Did Andrew J. Lawrence and his wife, Matilda, in 1867, sell and convey to Gay Hayden the lot of land designated in said partition proceedings as Lot 8? (No. 8.)

Yes.

10. Did Hannah E. Short, in 1869, sell and convey to James E. Wyche the lot of land designated in said partition proceedings as Lot 9? (No. 9.)

Yes.

11. Did Esther Short, acting under a Power of Attorney from Curtis F. Short, in 1858, sell and convey to Rufus Ingalls seven acres, more or less, of the lot of land designated in said partition proceedings as Lot 10? (No. 10.)

Yes.

12. Did Curtis F. Short, in 1860, sell and convey to E. A. and E. W. Slocum the residue of the lot of land designated in said partition proceedings as Lot 10? (No. 10.)

Yes.

13. Were the foregoing conveyances, if made, recorded in the Auditor's office of this County at or about the time they were made?

Yes.

Implied Findings.

All essential facts within the issues not expressly found by the Court are *presumed* to have been found in such a way as to support the judgment.

Servanti vs. Lusk, 43 Cal. 238.
Hixon vs. Brodie, 45 Cal. 275.
Kusel vs. Sharkey, 46 Cal. 3.

In Thompson vs. O'Neil, 41 Cal. 685, the Court says:

"The action is ejectment, and was tried before the Court without a jury. Written findings were filed, and a judgment entered for the defendant, from which the plaintiff appeals on the judgment roll alone, unsupported by a statement on appeal. The ground of error relied upon is that, on the facts expressly found, the plaintiff, and not the defendant, was entitled to judgment. But we must presume, in support of the judgment, that the Court found not only the facts included in the written findings, but also such other facts within the issues as are necessary to support the judgment. * * * * * The facts within the issues not expressly found are presumed to have been in accordance with the

judgment, which must, therefore, be affirmed, unless the express findings affirmatively show it to be erroneous. * * * * If no other facts than those expressly found were proved at the trial, it should have been made so to appear, either in the findings themselves, or on a motion for a new trial, or by a statement on appeal, in order to rebut the presumptions that those facts were proved and found. But as the case is presented on the judgment roll, the presumptions arising from the implied findings are not rebutted, and no error is shown."

"Judgment affirmed."

So, in Kusel vs. Sharkey, supra,—

"If the facts found are silent upon some material issue, the law implies that the Court found upon that issue in such a way as to support the judgment."

"A judgment rendered in an action tried by the Court without a jury will not be reversed for a defective finding of facts, unless exceptions are taken in the Court below, particularly specifying the defect."

Warner vs. Holman, 24 Cal, 228.

In the case at bar *no exceptions for defective findings were taken.*

No question can be made in this case as to the sufficiency of the evidence to justify the findings by the District Court, because *no motion for a new trial was made on that or any ground in the District Court.*

The Code of Washington provides:

SEC. 247. The order of proceedings on a trial by the court shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reason as far as applicable, and a new trial granted.

SEC. 280. Upon a trial by the court when the decision is given in vacation, a motion for a new trial shall be filed within twenty days from the time of filing such decision. If the next regular term of said court shall commence within less than twenty days

from the time of filing such decision, then such motion shall be filed by the first day of said term.

SEC. 281. In all cases of motion for a new trial, the grounds thereof shall be clearly specified and no cause of new trial, not so stated, shall be considered or regarded by the court.

SEC. 449. A judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been made and overruled.

STATEMENT.

The land in dispute, consisting of about 34 acres, is a part of 640 acquired by Amos M. Short and Esther Short, his wife, under the Donation Act of Congress, approved September 27, 1850.

The plaintiff and appellant claims title by virtue of certain deeds executed and delivered to Samuel R. Whipple by the heirs-at-law of Amos M. Short and Esther Short in 1877 and 1878.

The defendants and appellees claim title by virtue of a partition of the west half of said donation claim among said heirs in 1856, and a guardian's sale in 1865 of the part allotted to Grant H. Short, one of said heirs-at-law.

Appellees further claim that appellant has no title at all, legal or equitable.

As to their own title, appellees claim—

(1)—That they have both the legal and equitable title.

(2)—That, at all events, they have *"the superior title."*

(3)—That appellant is estopped from denying appellees' title, and from asserting his own, if he has any, as against the appellees.

(4)—That the Whipple-deeds, of 1877 and 1878, are inoperative and void as against the appellees.

The Code of Washington provides:

ACTIONS TO RECOVER AND AFFECTING REAL ESTATE.

SEC. 536. Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the district court. * * * *

SEC. 538. The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail.

Dates, Proceedings, etc., Prior to the Death of Esther Short, in 1862.

March 8, 1848.—Amos M. Short and Esther Short settled upon said donation claim.

March 8, 1852.—The four years' residence and cultivation were completed.

January 9, 1853.—Amos M. Short died intestate, leaving ten (10) children,—

MAXEY B. SHORT,	CURTIS F. SHORT,
GRANT H. SHORT,	SAMANTHA MORSE,
MATILDA SHORT,	JERUSHA SHOCKLEY,
HANNAH E. SHORT,	DRUZILLA BURLINGAME,
ALFRED D. SHORT,	AMOS C. SHORT.

December 12, 1854.—Letters of administration on

the estate of Amos M. Short were issued to Esther Short by the Probate Court of Clarke county.

December 18, 1854.—Esther Short was appointed guardian of the minor children.

June 9, 1856.—Esther Short having surrendered her letters of administration, Henry S. Burlingame was appointed administrator of said estate.

June 9, 1856.—Esther Short was appointed guardian of

Maxey B. Short,	Grant H. Short,
Matilda Short,	Hannah E. Short.

June 14, 1856.—J. P. Shockley was appointed guardian of

Alfred D. Short.

Note.—These appointments of guardians were made under the act passed January 26, 1855.

Session Laws 1855, p. 14, (Washington Territory.)

Section 24 of said act reads—

"The guardian of any minor may join in and assent to the partition of the real estate of such minor, under the direction of the court, upon a petition for partition."

The oral evidence shows an agreement between Esther Short and the heirs-at-law, made some time in 1855 or 1856, whereby Esther Short was to have the east half of the donation claim, and the heirs were to have the west half, which agreement was ever

afterwards acquiesced in, acted upon, and adhered to, by all of them.

See evidence of Burlingame and wife.

J. D. Biles, also, Van Vleet.

July 18, 1856, a petition in writing was presented to the Probate court, praying for partition of the real estate among the ten children, under Chapter IX. of the Probate Act of 1854.

The petition is contained in the transcript.

NOTE.—The inventory returned by Esther Short, Feb. 12, 1855, shows—

"1 Land Claim, $4,000."

The accounts rendered show all debts to have been paid, and a surplus of personal property remaining.

July 28, 1856.—William Kelly was appointed agent for Curtis F. Short, then in Texas, to represent him in the partition proceeding.

July 28, 1856.—Three commissioners were appointed to make partition.

July 29, 1856.—Warrant issued to said commissioners, with a notice endorsed thereon of the appointment of William Kelly as agent of Curtis F. Short.

August 17, 1856.—Said commissioners made their report, which is as follows:

Diagram Showing Partition as Made in 1856.

E

Acres.	R.	P.	86.17 Chains.
37	3	22	No. 10.
36	3	34	No. 9.
35	3	9	No. 8.
34	2	10	No. 7.
33	1	4	No. 6.
31	3	31	No. 5.
30	1	15	No. 4.
28	2	24	No. 3.
26	2	57	No. 2.
25	1	8	No. 1.

N — 45.00 Chains. — 54.97 Chains. — S

55 Chains.

W

Vancouver, Aug. 2, 1856.—We, the undersigned commissioners of the partition of the estate of Amos M. Short's land claim among the heirs of said estate, met on said claim August 2, 1856, after duly notifying said heirs, or their agent, interested in said partition of such meeting. We then agreed that said claim should be surveyed into ten parts of equal

width east and west, and authorized Lewis Van Vleet, county surveyor of Clarke county, to make said survey, and then adjourned said meeting until August 17, A. D. 1856.

August 17, A. D. 1856.—We met according to adjournment, having again duly notified each heir, or their agent, of such adjourned meeting. We then appraised said land claim and improvements at forty-nine hundred dollars, making each heir's part four hundred and ninety dollars. For description of said claim see accompanying plat, which we make a part of this report. For description of the several lots into which said claim is sub-divided see the same plat. Commencing with No. 1 on the west side and numbering eastward, the heirs interested all agreeing to the following partition: Lot No. 1 contains 25 acres, 1 rood, 2 perch, valued at five hundred dollars, and was selected by Henry Morse for Samantha Morse, and was set apart to her.

Lot No. 2 contains 26 acres, 2 rods, 27 perch, valued at five hundred and fifty dollars, and was selected by J. P. Shockley for Jerusha Shockley, and was set apart to her.

Lot No. 3 contains 28 acres, 2 rods, 24 perch, valued at four hundred dollars, and was selected by Henry Burlingame for Druzilla Burlingame, and was set apart to her.

Lot No. 4 contains 30 acres, 1 rod, 15 perch, valued at fifteen hundred dollars, and was selected by Clark Short, (Amos C. Short) and was set apart to him.

Lot No. 5 contains 31 acres, 3 rods, 21 perch, val-

ued at four hundred dollars, and was selected by Esther M. Short, guardian for Maxey B. Short, and set apart to him, Short.

Lot No. 6 contains 30 acres, 1 rod, 4 perch, valued at three hundred dollars, and was selected by J. P. Shockley, guardian for Alfred D. Short, and set apart to him, Short.

Lot No. 7 contains 34 acres, 2 rods, 10 perch, valued at three hundred dollars, and was selected by Esther M. Short, guardian for Grant Hall Short, and was set apart to him, Short.

Lot No. 8 contains 35 acres, 3 rods, 9 perch, valued at two hundred and fifty dollars, and was selected by Esther M. Short, guardian for Matilda E. Short, and was set apart to her, Matilda E. Short.

Lot No. 9 contains 36 acres, 3 rods, 34 perch, valued at three hundred dollars, and was selected by Esther M. Short, guardian for Hannah E. Short, and was set apart to her, H. E. Short.

Lot No. 10 containing 37 acres, 3 rods, 22 perch, valued at four hundred dollars, and was selected by Wm. Kelly, agent for Curtis F. Short, and was set apart to him, Short.

We, the undersigned commissioners, have appraised and divided the real estate of Amos M. Short among the heirs, and make to the honorable Probate court the above report.

In witness whereof, we have subscribed our names this 17th August, A. D. 1856.

Commissioners of the partition of the real estate of Amos M. Short, deceased, land claim.

LEWIS VAN VLEET,
DAVID PARKER,
LEVI DOUTHIT.

Vancouver, August 15, 1856.—The following survey of the west half of Amos M. Short's land claim, commencing at a cottonwood tree on the right bank of the Columbia river, known as south-west corner of said claim in his notification; thence north 55 chains; thence east 45 chains; thence south 86.17 chains to the Columbia river; thence west by meanders of said to place of beginning, containing 321 acres, 1 rod, 17 perch, and it is sub-divided into ten shares of equal width east and west, being 4.50 chains each, and in length north and south as follows, commencing with No. 1 on the west side and numbering eastward: West side of No. 1, 55 chains; east side of No. 1 and west side of No. 2, 59.04 chains; east side of No. 2 and west side of No. 3, 62.78 chains; east side of No. 3 and west side of No. 4, 66.57 chains; east side of No. 4 and west side of No. 5, 70.30 chains; east side of No. 5, and west side of No. 6, 23.41 chains; east side of No. 6, and west side of No. 7, 76.45 chains; east side of No. 7 and west side of No. 8, 79.17 chains; east side of No. 8 and west side of No. 9, 82.08 chains; east side of No. 9 and west side of No. 10, 84.22 chains; east side of No. 10, 86.17 chains.

Length of meanders on the river as follows:

No. 1. South 49½, east 6.04 chains.

No. 2. South 49½, east 5.85.

No. 3. South 49½, east 5.88.

No. 4. South 49½, east 5.84.

No. 5. South 53½, east 5.47.

No. 6. South 53½, east 5.47.

No. 7. South 61, east 5.25.

No. 8. South 61, east 5.35.

No. 9. South 61, east 4.97.

No. 10. South 61, east 4.87.

For quantities of land in each lot see plat of the above survey, which was made by me on the thirteenth and fourteenth day of August, A. D. 1856.

LEWIS VAN VLEET,
County Surveyor, Clarke Co., W. T.

October 15, 1856.—The Probate court made a decree establishing said report, the material part of which is as follows:

"The commissioners having awarded to the heirs of the said Amos M. Short, deceased, certain qantities of real estate, as shown by their report now on file in this office, * * * the heirs having agreed to the same, * * * the court does hereby order and decree that the report and division made by said commissioners upon the estate of Amos M. Short, deceased, shall be final, and that each heir named in said report shall have in their own right the property set apart to them."

October 18, 1856.—Said report, survey, diagram, etc., were recorded in the Auditor's office of Clarke County, W. T., in book of deeds.

According to the foregoing the west half of said donation claim was appraised at $4,900, and was divided into 10 lots, the allotment being as follows:

ALLOTMENT.		VALUE.
Lot No. 1.	To Samantha Morse.....	$500 00
" " 2.	" Jerusha Shockley.....	550 00
" " 3.	" Druzilla Burlingame.....	400 00
" " 4.	" Amos C. Short.....	1500 00
" " 5.	" Maxey B. Short.....	400 00
" " 6.	" Alfred D. Short.....	300 00
" " 7.	" Grant H. Short.....	300 00
" " 8.	" Matilda Short.....	250 00
" " 9.	" Hannah E. Short.....	300 00
" " 10.	" Curtis F. Short.....	400 00
		$4,900 00

Owelty was paid and the allotments made equal.

At the following term of court the proceeds of the surplus of personal property were distributed, giving to each of the children about $45, and the administration was closed.

Claim of Title in Severalty, and Conveyances made by the Heirs in Accordance with the Partition as made in 1856.

"Lot No. 1."

In October, 1857, Samantha Morse and H. C. Morse, her husband, sold and conveyed lot No. 1 to David Parker, by warrantry deed (consideration $900.)

"Lot No. 2."

In February, 1857, Jerusha Shockley mortgaged Lot No. 2 to Esther Short for $423.

In March, 1858, Jerusha Shockley and J. P. Shockley, her husband, sold and conveyed Lot No. 2 to Esther Short, by warranty deed (consideration $1,200.)

In February, 1864, Hannah E. Short, by her guardian, A. J. Lawrence, sold and conveyed lot No. 2 to S. R. Whipple (consideration, $545.)

NOTE.—Hannah E. Short became owner of this lot No. 2 by Will of Esther Short, who purchased it from Shockley and wife.

"Lot No. 3."

In June, 1862, Druzilla Burlingame and H. S. Burlingame, her husband, mortgaged lot No. 3 to F. Levi, for $250. (Mortgage cancelled December, 1862.)

In April, 1865, Burlingame and wife sold and conveyed lot No. 3 to S. R. Whipple, by warranty deed (consideration, $1,000.)

"Lot No. 4."

In October, 1856, Amos C. Short mortgaged lot No. 4 to Curtis F. Short for $90, to secure owelty.

In November, 1859, Amos C. Short and wife sold and conveyed lot No. 4 to Leander Holmes.

"Lot No. 5."

In October, 1860, Maxey B. Short mortgaged lot No. 5 to D. Hakes for $200. (Mortgage cancelled December, 1861.)

In June, 1867, Maxey B. Short sold and conveyed lot No. 5 to William Ranck and wife, by warranty deed. (Consideration, $800.)

"Lot No. 6."

In November, 1861, Alfred D. Short mortgaged lot No. 6 to G. W. Vaughn for $200.

In November, 1864, Alfred D. Short sold and conveyed lot No. 6 to Julius Suiste, subject to mortgage. (Consideration, $600.)

"Lot No. 7."

In May, 1864, Grant H. Short and wife, and Curtis F. Short, as his guardian, mortgaged lot No. 7 to Geo. Beatty for $200—all signing the note and mortgage.

In December, 1864, the same parties sold and conveyed lot No. 7 to Geo. Beatty—all signing the deed.

This sale and deed was afterwards set aside by the Probate court in January, 1865.

In April, 1865, Curtis F. Short, as guardian of Grant H. Short, by an order of the Probate court, sold and conveyed lot No. 7 to Nicholas Schofield for $785 in coin.

"Lot No. 8."

In March, 1862, Matilda Lawrence and A. J. Lawrence, her husband, mortgaged lot No. 8 to G. W. Vaughn for $500. (Mortgage cancelled in November, 1862.)

In August, 1863, they mortgaged lot No. 8 again to Jacob Duback for $600. (Cancelled March, 1865.)

In March, 1867, they sold and conveyed lot No. 8 to Gay Hayden for $600.

"Lot No. 9."

In September, 1869, Hannah E. Short mortgaged

lot No. 9 to Wm. C. Hazard for $470. (Cancelled March, 1870.)

In November, 1869, Hannah E. Short sold and conveyed lot No. 9 to James E. Wyche, annexing a plat of the partition as made in 1856.

"Lot No. 10."

In August, 1858, Curtis F. Short, being in Texas, executed a power of attorney authorizing Esther Short to sell real estate.

Under said power, Esther Short sold and conveyed seven acres of lot No. 10 to Rufus Ingles in 1858. (Consideration, $500.)

In April 1860, Curtis F. Short, in person, sold and conveyed lot No. 10 to E. A. and C. W. Slocum, by warranty deed. (Consideration $1,200.)

All these conveyances were duly recorded at or near the time of their execution, and all describe the lands by lots, etc., according to the partition as made in 1856, and refer to the records of the report of the commissioners' survey and plat in the Auditor's office.

Findings of Fact by the District Court as to the Partition.

1. None of the heirs-at-law have done any act, at any time, indicating his or her intention to disaffirm, or not be bound by the partition made in 1856, other than making their deeds to Samuel R. Whipple in 1877 and 1878.

(13th Finding.)

2. From the time partition was made in 1856 until the making of their deeds to Whipple, each and

all of the heirs have acquiesced in the partition as made, and have claimed and held, in severalty, the portions allotted to them according to the partition. (14th Finding.)

3. Owelty was paid or secured to those entitled thereto. (16th Finding.)

4. Those who were minors in 1856 adopted the partition as made in 1856. (18th Finding.)

5. The proceedings in partition—report, survey and plat—were recorded in the Auditor's office of Clarke county, in October, 1856. (22d Finding.)

6. Conveyances of lot No. 1 to lot No. 10, inclusive, were made at the time and by the persons heretofore named. (Findings as to conveyances, 1 to 13, inclusive.)

7. Esther Short died in 1862.

The Partition of the West Half among the Children.

Upon the foregoing state of facts we maintain,—

I.

That the partition as made in 1856 *is now* valid and binding *as a judicial partition.*

The partition may be upheld on various grounds,—

1st. Acquiescence.

2d. Ratification.

3d. Estoppel.

In *Campbell* v. *Wallace,* 12 N. H., 362, it is *held*—

Where a partition of real estate by a probate court has been acquiesced in by the heirs for twenty years, the proceedings of the court will be presumed to have been regular, and conclusive.

37 Am. Decis., 220.

In *Piatt* v. *Hubbell,* 5 Ohio, 243, it appeared that proceedings in partition had been instituted and commissioners appointed who made partition and report, but no judgment was entered thereon or any further proceedings had; yet possession was taken in severalty in accordance with the partition as reported; and, although some of the parties were infants, it was *held*—"That after an acquiescence of seventeen years, equity would not disturb it."

In *McGregor* v. *Reynolds,* 19 Iowa, 228,—"Where commissioners appointed to make partition, treated a portion of the land as a part of the public street, and made partition of the remainder, *held*—That the acceptance of the partition by the parties estopped them from denying the validity of the partition, or that the portion not divided was a part of the street."

In the present case there was more than "the acceptance of the partition by the parties."

All "*agreed*" to the partition at the time.

Each "*selected*" his or her lot.

Four of the children, who were adults, acted in person.

Five were represented by guardian, who was authorized by statute to "*join in and assent to*" partition.

William Kelly acted as agent for Curtis F. Short,

who afterwards adopted the acts of the agent, and made them his own.

All *accepted* the portion allotted to him or her.

All, whose lots were of less value than others, received owelty.

Esther Short as guardian of Maxey B. Short, Grant H. Short, Matilda Short and Hannah E. Short, received $710 to equalize their allotments.

(See her receipt of Oct. 15, 1856.)

J. P. Shockley, as guardian of Alfred D. Short, received $190.

(See his receipt, Oct. 15, 1856.)

See, also, testimony of Druzilla Burlingame and H. S. Burlingame.

The partition, then, was fair and equal, and no murmur of complaint has ever been heard.

Henry S. Burlingame and wife both testify that no one, except Leander Holmes, has ever questioned the fairness or validity of the partition as made in 1856.

Confirmation of Invalid and Imperfect Partitions.

"A partition which, in itself, is invalid as against some of the parties, or is imperfect because not sanctioned by the final judgment of the court wherein it was made, may become binding by reason of the acquiescence of the party who had reason to complain of its imperfection or validity. Hence a cotenant who, though not a party to the partition, accepts the portion allotted to him, and holds and conveys

the same in severalty, will not be subsequently permitted to avoid the partition."

Freeman on Cotenancy and Partition. Sec. 535.

Mellican v. *Mellican,* 24 Tex., 439.

Jackson v. *Rachmyer,* 13 Johns, 376.

White v. *Clapp,* 8 Met., 370.

McQueen v. *Fletcher,* 4 Rich. Eq., 152.

McGregor v. *Reynolds,* 19 Iowa, 228.

Piatt v. *Hubbell,* 5 Ohio, 243.

And so, "a partition, if fair and equal, and exeeucted by possession, is good, although some of the tenants be under coverture."

McMahan v. *McMahan,* 13 Pa. St., 381.

(2.) The proceedings in partition may have been irregular and erroneous, but they can not be *collaterally* impeached for any irregularity, error, or omission.

This principle of law is too familiar to require citation of authorities. It is clearly stated and applied in,—

White et al v. *Clapp,* 8 Metcalf, 365.

Thompson v. *Tolmie,* 8 Curtis' Decis., 62.

Dilwooth v. *Rice,* 48 Mo., 124.

Grignon's Lessee v. *Astor,* 2 How., 379.

(3.) Such proceedings, if void originally, may be ratified either directly or by a course of conduct which estops the parties from denying their validity.

Maple v. *Kussart,* 53 P. St., 348.

Tooley v. *Gridley,* 3 S. & M., 493.

Freeman on Void Sales, Sec. 48.

Again,—As a general rule, where the partition is invalid for some reason, as to some or all the parties, as where some of the cotenants were not parties, or the partition has not been sanctioned by a final judgment of the court, etc., if the parties treat it as valid and accept their purparty, it becomes binding on them by such subsequent acts of ratification, and they have been held estopped from alleging its invalidity.

40 Am. Decis., 642 (note.)

Citing,—

Mellican v. *Mellican,* 24 Texas, 439.

White v. *Clapp,* 8 Metcalf, 370.

Piatt v. *Hubbell,* 5 Ohio, 243.

Freeman on Cotenancy, Sec. 535, and other cases.

We maintain,—

II.

That the partition as made in 1856, is valid and binding as a *voluntary parol partition.*

On this point the law is well settled in numerous cases.

In *Wood* v. *Fleet,* 36 N. Y., 499, the law of parol partition is very fully considered, and many cases are referred to, one of which is *Jackson* v. *Hardee,* 4 Johns., 202, holding "that a parol partition of land, carried into effect by possession taken by each party according to the partition, will be valid and binding on the parties."

In that case, three owners of the land agreed upon a division of it, and a plan was chalked out upon a barn. A survey was afterwards made according to

the plan, and the parties afterwards occupied in severalty according to such division.

Kent, C. J., said in the opinion of the court: "The validity of the partition is not to be questioned. It did not require releases to make the division valid."

So, in Indiana, "A parol partition by tenants in common is valid, where possession is taken and held in pursuance of such partition."

Morse v. *Kerr, et. al.,* 46 Ind., 468.
Lauterman v. *Williams,* 55 Cal., 60.

So in Wisconsin. "A parol partition of land carried into execution by each party taking possession of his portion in accordance therewith, is binding upon the parties."

Buzzell v. *Gallaher,* 28 Wis., 678.

Approving—

Eaton v. *Talmadge,* 24 Wis., 217.

So in Vermont. "A division in fact of land among the proprietors, however informal, if acquiesced in for fifteen years, has always been considered, in this state, equivalent to a legal division.

Booth v. *Adams,* 11 Vt., 156; 24 Vt., 560.

Let all *judicial action* be expunged from the proceedings for partition, and we then have a complete parol partition, carried into execution.

We have,—

1. The petition signed by all in person or by guardian, except Curtis F.
2. Three men agreed upon to make partition.
3. Survey, plot and valuation agreed to.

4. Each selecting his or her lot—William Kelly acting for Curtis F. Short, who afterwards adopted his acts.

5. Owelty paid and received.

6. Survey, plot, &c., recorded.

7. The adults and guardians of minors claiming and holding in severalty.

8. Mortgages and deeds according to partition.

9. Acquiescence by all, after age, for periods varying from eight to twenty-four years.

Long v. *Dollarhide,* 24 Cal., 218.

III.

The subsequent conveyances were not only a ratification of the partition as previously made, but they produced of themselves a valid and binding partition.

That two or more tenants in common may produce a valid and binding partition by separate conveyances to third persons, whereby each conveys a distinct portion in severalty, can not be questioned.

Thus,—"Where one of two tenants in common conveys the whole of the north half of a tract of land, and the other subsequently conveys the south half, this produces a complete and binding partition."

Eaton v. *Talmadge,* 24 Wis., 217.

In the case already cited, (69 Pa. St., 449) the Supreme court of that state says: "The court below should have instructed the jury that Bowman Furnier (plaintiff) by his deed absolutely ratified the partition." * * * "He conveyed the share al-

lotted to him by the award." * * * "He received the full value of his one-third of the land." * * * "What can be a more unequivocal and conclusive ratification by an infant, of a partition made by his guardian, than a sale and conveyance of the land allotted to him after coming of age?"

Besides, these conveyances operate as an estoppel. In *Varnum* v. *Abbot,* 12 Mass., 474, it is said: "Although a conveyance by one tenant in common of a part of the land by metes and bounds to a stranger can have no legal effect to the prejudice of a co-tenant; yet it operates as an estoppel as against the grantor, and those claiming under him."

Parol Partitions---How Viewed in Equity.

Whatever effect may be conceded at law to parol partitions, when executed by possession taken and mutually acquiesced in by the parties for a long time, they will be recognized and enforced in equity.

Kennedy v. Kennedy, 43 Pa. St., 417.

Massey v. *McIlwain,* 2 Hill Ch., 424.

Pope v. *Henry,* 24 Vt., 560.

Goodhue v. *Barnwell,* Rice Eq., 236.

Tomlin v. *Hilyard,* 43 Ill., 302.

Freeman on Cotenancy and Partition, Sec. 402, and cases.

Ebert v. *Wood,* 1 Binney, 218.

Election and Ratification.

Another principle of law prevents the heirs and their grantees from denying the validity of the partition.

That principle of law is stated in *Brant* v. *The Virginia Coal Co.*, 93 U. S., 326, and is this,—

"Where one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits."

According to the evidence and findings in the case at bar, (not estimating owelty),—

Samantha Morse received for					Lot No. 1....	$ 900
Jerusha Shockley	"	"	"	"	2....	1200
Druzilla Burlingame	"	"	"	"	3....	1000
Amos C. Short	"	"	"	"	4....	3500
Maxey B. Short	"	"	"	"	5....	800
Alfred D. Short	"	"	"	"	6....	800
Grant H. Short	"	"	"	"	7....	785
Matilda Short	"	"	"	"	8....	600
Hannah E. Short	"	"	"	"	9....	900
Curtis F. Short	"	"	"	"	10....	1700
Total.....						$10,185

To this may be added owelty paid to,—

Maxey B.....	$ 90
Grant H.....	190
Matilda	240
Hannah E.....	190
Druzilla	90
Alfred D.....	190
Curtis F.....	90
Total.....	$1080

In *Brant* v. *The Virginia Coal Co.*, after stating the general rules of law governing estoppels *in pais*, this court said,—

"There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which *the presence of fraud, actual or constructive, is wanting;* as when one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss; and where one has *received the fruits of a transaction,* he is not permitted to deny its validity *whilst retaining its benefits.* But such cases are generally referable to other principles than that of equitable estoppel, although *the same result is produced;* thus the first case here mentioned is the affixing of liability upon the party who from negligence indirectly occasioned the injury, and the second is the application of the doctrine of *ratification* or *election.*"

This extract from the opinion of the court throws a flood of light upon the acts and conduct of the heirs-at-law of Amos M. Short, as to the partition made in 1856, and their conveyances in severalty in accordance therewith, and upon the acts and conduct of Grant H. Short, as to the guardian's sale of his allotment in 1865, and his subsequent acts, conduct, omissions and negligence.

Actions to Recover and Affecting Real Estate.

The Code of Washington provides,—

SEC. 536. Any person having a valid subsisting interest in real property and a right to the possession

thereof, may recover the same by action in the District court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein.

SEC. 538. The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.

As to the Widow.

Esther Short, and those claiming under her, are forever estopped from denying the validity of the partition of the west half of the claim among the children.

It is admitted that no part of the west half was allotted to her. She lived until June 28, 1862, and it does not appear that she ever made any claim whatever in or to the west half of the donation claim.

She, as guardian of four of the children, signed the petition asking that partition be made.

She participated in the proceedings.

She "selected" lots 5, 6, 7, 8, for her wards.

She received $710 to make their allotments equal to others.

She assented to all that was done, asserting no rights, making no objection, giving no notice of any claim.

Up to the time of her death she stood by and saw the children claiming and exercising acts of ownership in severalty, according to the partition.

She saw the adults making sales and conveyances of their lots, and receiving money for them from third persons.

She, in 1857, took a mortgage on lot No. 2 from Jerusha Shockley.

She, in 1858, purchased lot No. 2 for $1,200.

She, in 1858, acting as attorney for Curtis F. Short, sold 7 acres of lot No. 10 for $500.

She thus acquiesced, acted, and encouraged others for six years after partition was made.

The law under similar circumstances, if any be wanted, will be found in,—

Wiseman v. *Macy,* 20 Ind., 239.

Drake v. *Wise,* 36 Iowa, 476.

Bullis v. *Noble,* 36 Iowa, 618.

Such acts and conduct as would estop her, if now living, will estop those claiming under her from asserting any title, derived from her, to the land of which partition was made.

The Title in 1856.

We may here state that it is not claimed that the heirs at law of Amos M. Short acquired title *by descent,* nor that his portion of the donation claim became, at his death, subject to administration as a part of his estate.

Evidently all concerned in making partition acted

upon the supposition that the heirs took by inheritance, and that the land was a part of the estate of Amos M. Short, and subject to administration as such.

But the law is otherwise, and is so held in *Mizner* v. *Vaughn*, 2 Sawyer, 269, and other cases.

In that case it is *held*, "when a settler under Sec. 4 of the Donation Act dies intestate, after complying with the act, and before patent issues, his estate terminates, and the remainder at once vests in his children as the direct donees of the United States, and not by descent as the heirs of such settler."

The facts in the present case are precisely the same as in that, and the law must be the same.

This makes it all the more certain that the partition as made is valid and binding upon each and all of the heirs, including the widow, and upon their grantees.

The donation act is a *present* grant upon conditions subsequent. Upon compliance with these conditions the legal title at once vests before patent issues.

Lee v. *Summers*, 2 Or., 260.

Blakesly v. *Caywood*, 4 Or., 279.

Such being the law, the widow and children of Amos M. Short, at his death, became owners in fee and tenants in common of said donation claim.

Prior to the partition of the west half, Esther Short and the children made a voluntary parol agreement by which she was to have the east half of the claim, and they the west half. This parol agreement was carried into execution, and has ever since been acquiesced in and acted on by all concerned.

Upon this point the Supreme court of Pennsylvania has used explicit language:

"A parol agreement for partition of land is good, if carried into effect, and, if fair and equal, is binding upon those who are *femes covert,* if their husbands join."

And, after showing that one or more co-tenants could compel partition, the court says: "Being compellable by law to make partition, they might well do it without process of law; and if made equally it would forever afterwards be binding * * * ."

"Neither is it essentially necessary that a voluntary partition should be by deed in order to make it binding * * * ." (Citing cases.)

"Seeing, therefore. that any one of the heirs may compel partition of the estate to be made by legal process, it follows from the established doctrine laid down above, that if it be done by the agreement of the parties, without legal process, and be fair and equal, it will be binding upon all, whether *femes covert* or not, if their husbands join, *or minors, if with the consent of their guardians."*

Calhoun v. *Hays*, 8 Watts & Sergt., 127.

So in *Ebert* v. *Wood*, 1 Binney, 216, it is held: "A parol partition made betweeen tenants in common, by marking a line of division on the ground, and followed by a corresponding possession, is good, *and not within the statute by which a writing is made necessary for the passing of an estate or interest in land."*

2 Am. Decis., 436.

So a parol partition is binding on *femes covert*, who are parties to it.

McConnell v. *Cary*, 48 Pa. St., 345.

Other principles of law sustain the parol partition between the widow and children.

1. A minor, after coming of age, may ratify the acts of his guardian and render them as valid and binding as if done by himself when of full age.

Johnson v. *Furnier*, 69 Pa. St., 449, is directly in point.

In this case, a widow (re-married), and the guardian of three children, who were tenants in common of a tract of land, assented to a parol partition between the widow and minor children.

After coming of age, the children conveyed their part by deed, referring to the partition: *Held*, "That the deed ratified the partition." Also *held*, "That family arrangements should not be disturbed after long acquiescence, which is strong evidence of ratification by a ward of the act of his guardian." Also that a partition by an infant, although unequal, is only voidable after he comes of age; and, if he take the whole profits (as by seelling his share), the partition is good forever.

So, in *Brown* v. *Caldwell*, 10 Sergeant & Rawle, 114, it is held, "If consentable lines between adjoining tracts of land are agreed upon by the guardian of an infant, if the infant do not dissent when he comes of age, but acquiesces, he is forever bound."

So, if he continues in poossession of the land, under similar circumstances.

2 Vt., 225.

2. A court of equity will compel the specific performance of a parol partition, as of any other con-

tract relating to lands, whenever it has been carrried into execution by the parties.

Goodhue v. *Barnwell*, Rice, Esq., 236.

Tomlin v. *Hilyard*, 43 Ill., 302.

Freeman on Co-tenancy, etc., Sec. 402.

3. Equitable estoppels apply to infants and *femes coverts*, as well as to other persons; and such estoppel, arising from acquiescence, acts and conduct of the parties to the parol division of the donation claim, should be applied in this case.

McPherson v. *Cunliff*, 11 Sergeant & Rawle, 426.

14 Am. Decis., 642.

Freeman on Void Sales, p. 69 and cases.

4. The Donation Act required the Surveyor General to "designate the part enuring to the husband and that to the wife, and enter the same on the records of his office."

This designation was in accordance with the division agreed upon by the widow and children, and probably at their request. At all events, being a ministerial act, it took effect *by relation*, as of the time when the title vested, to-wit: on compliance with the conditions of the act.

It is a mistake to suppose that title to lands acquired under the Donation Act is not perfect until patent issues. All the adjudged cases are against such a supposition.

They all hold, that "the Donation Act is a grant '*in presenti*' of an estate in fee, subject to be defeated by non compliance with the conditions subsequent therein expressed."

"Upon compliance with the requirements of said act, title vests in virtue of the act itself."

"The issuing of the patent is a ministerial act, and is mere evidence of title in that class of cases."

Dolph v. *Barney*, 5 Oregon, 191.

Chapman v. *School District*, 1 Deady, 108.

Murray v. *Murray*, 6 Oregon, 26.

Under Sec. 4, of the Donation Act, the settled doctrine is, that, upon the death of a settler, after compliance with the law, and before patent issues, the share of the deceased is *granted by the act* to his widow and children, and they take as donees of the United States, and not as heirs of such settler, and become *at once* owners in fee of the land.

Lamb v. *Wakefield*, 1 Sawyer, 251.

Mizner v. *Vaughn*, 2 Sawyer, 269.

"Notice to Surveyor General," by Amos M. Short, &c.

Opposite counsel endeavors to make it appear that Amos M. Short never acquired any rights as a settler under the Donation Act by reason of his alleged failure to file with the Surveyor General a notice of his claim within the time fixed by the act.

Evidently counsel have overlooked the act of Congress approved June 25, 1864, amending the Donation Act and acts supplemental thereto, and declaring that "*a failure to file such notice within the time fixed shall not work forfeiture*," etc.

U. S. Statutes At Large, Vol. 13, p. 184.

When the husband has completed the four years'

residence and cultivation, the wife, or in case of his death, the widow becomes the "claimant" and owner of one-half of the land, and may file notice and make proof of compliance with the conditions of the act.

U. S. v. *Tichnor*, 8 Sawyer, 149.

The Guardianship of Grant H. Short, and His Acts and Conduct as to Lot No. 7.

In October, 1856—Grant H. Short, by his guardian, Esther Short, received $190 to make lot No. 7 equal in the partition.

1862, 1864, 1865.

June 28, 1862.—Esther Short died, and sometime afterwards Amos C. Short was appointed guardian of Grant H. Short.

February 3, 1864.—The letters of Amos C. Short, as guardian, were revoked, and Curtis F. Short was appointed guardian of Grant H. Short.

February 4, 1864.—Inventory was returned, showing real estate belonging to Grant H. Short,—lot No. 7, as set apart to him by the commissioners in making partition, appraised at $800.

May 9, 1864.—Grant H. Short and his wife, and Curtis F. Short as guardian, under an order of court authorizing the same, borrowed $200 of George Beatty, and gave a note secured by mortgage on lot No. 7, all signing the note and mortgage.

On the same day Grant H. Short in person gave the following receipt:

"VANCOUVER, May 9, 1864.

$200.00.

"Received of Curtis F. Short, my guardian, the sum of two hundred dollars in gold coin, it being the same money obtained by him for me on a certain note and mortgage bearing even date herewith, from George Beatty, said mortgage being *upon my real estate* in Clarke county, and made and executed in accordance with an order of said Probate Court of Clarke county, Washington Territory.

"GRANT H. SHORT."

December —, 1864.—Grant H. Short and his wife, and Curtis F. Short as guardian, sold and conveyed lot No. 7 to George Beatty for $1,000 currency, all signing the deed. This sale and deed were afterwards set aside by the Probate court.

January 26, 1865.—Guardian made full report.

February 7, 1865.—Guardian files a petition asking for an order to sell lot No. 7.

March 6, 1865, fixed for hearing said petition.

March 6, 1865.—Order made to sell.

April 20, 1865.—Sale made to Nicholas Schofield for $785 gold coin, Grant H. Short being present.

April 26, 1865.—Return of sale made.

April 29, 1865.—Sale confirmed at a regular term, commencing April 24th.

April 29, 1865.—A deed was executed and delivered by Curtis F. Short as guardian, to Nicholas Schofield, and the money ($785) paid.

Grant H. Short being present at the sale, and

about twenty years of age, encouraged bidders and expressed himself as satisfied with the sale.

The guardian's deed describes lot No. 7, and refers to the partition made in 1856.

April 29, 1865.—Guardian filed report and final account.

November 8, 1872.—Nicholas Schofield conveyed lot No. 7 to Mary Schofield, his wife.

Schofield and wife have been continually in possession and improving said land since April, 1865.

October 13, 1877.—The patent for the donation claim issued, giving and granting the west half to Amos M. Short and his heirs, and the east half to Esther Short and her heirs.

March 16, 1878.—Grant H. Short gave his quit-claim deed to Samuel R. Whipple of all his right and title in the *donation claim* of Amos M. and Esther Short.

Plaintiff claims title to lot No. 7, under Whipple through sundry *mesne* conveyances.

The Guardian's Sale.

The only irregularity of any importance in the proceedings to sell lot No. 7, is the alleged insufficient publication of the notice to show cause on March 6, 1865.

In the District Court it was claimed by opposite counsel that this was a fatal defect, rendering the sale void.

Two answers may be given to this claim:

I.

The guardian of the minor, and George Beatty, mortgagee of lot No. 7, signified their consent, in writing, to the sale.

(See petition for order to sell, and the *written consent* of Beatty endorsed thereon. Also, Probate Act, 1863, Sec. 219.)

This dispensed with the necessity of publishing notice.

II.

The alleged defect is not a *jurisdictional one*, even if no consent in writing had been given.

This question was considered by the Supreme Court of the United States in *Mohr* v. *Manierre*, 11 (eleventh) Otto, 417, in which it is held,—

1. That publication of such notice is not essential to the jurisdiction of the court.

2. That as to the rights of the ward, jurisdiction attaches on the filing of the petition.

3. That the license to sell is not rendered invalid by an insufficient publication of such notice.

The defect, if it be one, is then only an irregularity or error. which cannot be inquired into in a collateral action.

Comstock v. *Crawford*, 3 Wall., 396.

Grignon's Lessee v. *Astor*, 2 How., 319.

These three cases settle the whole law as to the guardian's sale, as well as other questions in this case.

Orders and Decrees of Probate Courts---Notices, &c.

A grant of probate or of administration is in the nature of a decree *in rem*, and so of the grant of authority to a guardian of the estate of a minor.

Freeman on Judgments, Sec. 608 and cases.

On making orders and decreeing a sale of the real estate of a deceased person, minor, or lunatic, the court acts *in rem*. (Sec. 609.)

So in 2d Howard, 338, "on a proceeding to sell the real estate, there are no adversary parties, the proceeding is *in rem*, the administrator, (or guardian) represents the land." * * * "The only question of jurisdiction is the power of the court over the thing. The sale is a proceeding *in rem*." "In the Orphan's court, and all courts having power to sell such estates, their action operates on the estate." * * * "A purchaser under the sale is not bound to look beyond the decree," or "further back than the order of the court."

To the same effect is *McPherson* v. *Cunliff*, one of the leading cases in the United States.

Hence, it is *held*, and for apparent reasons, that statutes requiring notice of such proceedings to be given to persons interested in the estate are *directory* merely, and that an insufficient notice, or service, or publication does not affect the *jurisdiction* of the court or render the sale void.

That the validity of the sale cannot be *collaterally* attacked, but that such irregularity, error, or omis-

sion must be corrected by an appeal or some direct proceeding for the purpose.

11 Otto, 417.

8 Curtis, 62.

3 Wall., 396.

2 Pet., 165.

Mulford v. *Berwidge*, 78 Ill., 455.

18 How., 497.

11 S. & R., 422.

8 Oh. St., 614.

Counsel for appellant insist that,—

"Notice must be given the *ward*," "or the sale is void," citing,—

Lyon v. *Vanatta*, 35 Iowa, 521.

Rankin v. *Miller*, 43 Iowa, 11.

It is in vain for counsel to cite Iowa cases in support of such a point.

The statute of Iowa is this, and is quoted in the above cases,—

"A copy of the application with a notice of the time and place at which such application will be made to the court must be served personally on the minor."

Our statute requires notice in such cases to be served on "the general guardian" of the minor, who, in this case, was Curtis F. Short, and who *appeared*.

Statute 1863, p. 240, Sec. 221.

And the court says in 35 Iowa,—"it is to be borne in mind that for a defect in the *notice* or *service*, the

judgment will not be held void when collaterally attacked," citing,—

24 Iowa, 217.

32 Iowa, 475.

Lyon v. *Vanatta*, 35 Iowa, was a direct proceeding to set aside a guardian's sale for fraud and collusion.

Council tell us "there was no description of the property in the petition necessary to give the court jurisdiction."

The petition and report of the guardian, (January 26, 1865,) and the action of the court thereon, the petition of April 29, 1865, the published notice of sale, were all before the court on the day of confirmation of sale; and the guardian's deed of April 29, 1865, fully described the land sold as "lot 7, set apart" to Grant H. Short by the commissioners, &c.

Besides, prior to the order of sale the court had authorized a mortgage of this identical lot, and had set aside a deed of the same, both of which described and identified the land ordered to be sold.

In probate proceedings a description of the land in a petition may be aided by reference to facts of which the court has judicial knowledge, or *by other papers in the case.*

Bloom v. *Burdick*, 37 Am. Decis., 303.

Freeman Judgments, Sec. 48.

"The proof of publication in the case was made by one styling himself an attorney."

To this we answer,—there is *other proof* of publication in the case, to-wit: proof by the printer with the printed notice annexed.

An insufficient publication of notice to show cause does not render the order of sale *void*. This is distinctly held in the Iowa cases cited by opposite council, as well as by the Supreme Court in 11th Otto.

The validity of such order cannot be *collaterally* attacked.

Comstock v. *Crawford*, 3 Wall., 396.

Grignon's Lessee v. *Astor*, 2 How., 319.

Guardian's Deed.

The guardian's deed ("Ex. D. 37") recites at large the order of confirmation, and refers to the order of sale, giving its date, &c., as "made March 6, 1865," and also refers to "the report of the sale made by the guardian April 26, 1865," "of the real estate of said minor," giving a description of the land sold as "lot 7, set apart to Grant H. Short by the commissioners," &c.

This is enough.

Freeman on Executions, Sec. 329.

And Mr. Freeman on Void Sales, speaking of a New York case holding it necessary that such deed should contain the order of sale at large, says,—

"The correctness of this decision may be doubted."

Defective Execution of the Guardian's Deed.

Equity will always aid the defective execution of a valid power.

1. Where the defective execution was caused by "mistake" or "carelessness."

2. Where the power is "coupled with a trust" Story's Equity, Secs. 97, 98.

Segee v. *Thomas*, 3 Blatch. C. C. R., 11 is a case in point, holding that "a court of equity will interfere in favor of a grantee in the deed of a guardian defectively executed, to aid such defective execution."

That "where a minor has received the money paid for his real estate, sold by guardian, and retains it, —the vendee having entered into possession and made improvements on the land—a court of equity will enjoin the minor from prosecuting an action of ejectment after coming of age against the vendee of the land, and will compel him to convey to the vendee all his right and title to the land."

This case has an important bearing on the present one in other respects.

Ratification of Sale.

Grant H. Short became of age in 1866.

(3d Finding.)

Value of lot No. 7 in 1865..... $800 coin.
Sold in 1865 for..... 785 "

(12th Finding.)

Improvements put on lot since 1865 by defendants..... $2,000
Present value..... 7,000
Taxes paid annually..... 20

(10th, 11th, 12th Findings.)

As to the ratification of *void* sale by acts and acquiescence.

Maple v. *Kassant*, 53 Pa. St., 348.

Ratification by *mere* silent acquiescence, *and* standing by while another is making improvements, &c.

Sims v. *Everhardt*, 12 Otto, 312.

Lot No. 7 was sold for the purpose of paying "*the just debts*" of Grant H. Short, and of furnishing him with "*necessaries*," and the money was so applied. (7th and 15th Findings.)

Grant H. Short, before and after coming of age, had notice of the proceedings in the Probate court affecting his real estate. (19th Finding.)

Grant H. Short has known, all along since 1865, that Schofield was in possession of lot No. 7, cultivating and improving the same. (20th Finding.)

Neither Grant H. Short, nor any one claiming under him, has ever returned or offered to return any of the purchase money paid by Schofield for the land. (8th Finding.)

Grant H. Short has never done any act indicating his intention to disaffirm the sale, other than making the deed to Whipple in 1878, twelve years after coming of age.

If such acts and such acquiescence are not a ratification of the sale, they certainly operate as an estoppel under the authorities cited from,—

3d Blatch., C. C. R., 11.

11th Sergeant & Rawle, 426.

14th Am. Decis., 642.

Other authorities might be added, such as,—

"A minor's deed of land is binding on him, if, after arriving at majority, he knowingly suffers the

grantee to make valuable improvements, without announcing his intention to avoid the deed."

Davis v. *Dudley*, 70 Me., 236.

25 Am. Rep., 318.

Such being the law in the case of a deed made by the minor himself, it must also apply to the case of a sale and deed made by a guardian with knowledge, consent and approval of his ward, as in this case.

The voidable deed of an infant may be ratified, after coming of age, by acts which reasonably imply an affirmance, or by an omission to disaffirm the deed within a reasonable time.

Hastings v. *Dollarhide*, 24 Cal., 195.

In this connection the statute of Washington Territory concerning minors, passed in 1866, has an important bearing, which is as follows:

Sec. 2. "A minor is bound, not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority." * * *

Session Laws 1866, p. 92.

For twelve years after attaining his majority, Grant H. Short, knowing of the sale made by his guardian, knowing that Schofield was in possession of lot 7, improving the same, remained silent, neither saying nor doing anything indicating an intention to disaffirm the sale made by his guardian.

Incidental Points.

One who has been under guardianship is chargeable with constructive notice of all proceedings of the Probate court affecting his real estate.

Robert v. *Marvin*, 27 Mich., 306.

An heir-at-law (or any other person) may be estopped by his acts, or by a judicial proceeding to which he was a party, or by receiving the benefit of a proceeding or transaction.

McPherson v. *Cunliff*, 11 Sergt. & Rawle, 422.

The appointment of an administrator or guardian by a court of competent jurisdiction, will be presumed rightful, and cannot be questioned or examined *collaterally* in any other tribunal.

Vandyke v. *Johns*, 12 Am. Decis., 76.

Johnson v. *Beazley*, 27 Am. Rep., 276.

Fisher v. *Bassett*, 33 Am. Decis., 227.

28 Vt., 663.

20 Am. Decis., 463.

On *the filing of a petition* by an administrator or guardian for an order to sell real estate *jurisdiction attaches.*

Overton v. *Johnson*, 17 Mo., 442.

The sufficiency of the facts stated in such petition cannot be questioned in a collateral proceeding.

Morrow v. *Weed*, 4 Iowa, 77.

"The granting of the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they exist or not is wholly immaterial, if no appeal is taken."

2 Howard Rep. (U. S.), 340.

The decree of a Probate court confirming a sale by an administrator can not be impeached collaterally.

Van Dyke v. *Johns*, 12 Am. Decis., 76.

No positive act of ratification need be shown. Silence, or a neglect to disaffirm for an unreasonable time, will amount to a ratification.

Kline v. *Beebe*, 6 Conn., 504.

35 Am. Rep., 318.

Statute W. T. (1866), p. 16, Sup. Code.

Even *void* judicial sales and proceedings may be ratified, either directly or "by a course of conduct which estops a party from denying their validity."

Freeman on Void Sales, Sec. 48 and cases.

Where evidence objected to is admissible for *any* purpose, the objection is not well taken, and should be overruled.

Redundancy of evidence, not contradicting an allegation, does not vitiate, merely because more is proved than is alleged.

1 Gr. Ev., Sec. 67, p. 90.

The "findings" of the court below are conclusive, and cannot be re-examined by this court, because no motion for a new trial was made in the District Court.

See Code, Secs. 247, 280, 281 and Sec. 449.

Wiley v. *Jones et al*, 603, W. T. Rep.

On appeal, the findings of fact by the court be-

low must be accepted as correct until set aside in *that* court.

Hallock v. *City of Portland*, 8 Oregon, 29.

6 Oregon, 428.

45 Cal., 247.

The mode of reviewing the action of the court upon an issue of fact is the same, whether the case is at law or in equity; and in order to review a question of fact there must have been a motion for a new trial.

Harris v. *S. F. S. R. Co.*, 41 Cal., 393.

34 Cal., 648.

Other Questions.

Some other questions were raised in the court below, which ought to be passed upon by this court.

One of them is this:

The appellees claim that the appellant has not a "*valid subsisting interest*" in the land in controversy, within the meaning of Section 536 of the Code, and cannot maintain the action for that reason.

This question arises out of the answers given by plaintiff in the District Court, to the interrogatories propounded by the defendants in writing.

His answers are in substance as follows:

"I have no interest in the above entitled case, except that I hold the title to the land claimed therein, in trust, for Leander Holmes and David Goodsell."

"I have an interest in said case as above stated, and not otherwise."

"Said Leander Holmes and David Goodsell are the beneficiaries for whom I hold the land in question in trust."

"I do not know, except from heresay, who paid for the land, or how much was paid, or to whom, or by whom it was paid."

To interrogatory No. 4 he answers:

"I answer this as I answer interrogatory No. 1." That is, that he has no interest in the land described in the complaint. (See interrogatory No. 4.)

From this it very clearly appears that the plaintiff is a mere naked trustee, having *no interest in the land*, and *no duty to perform*, except to *hold* the title for Holmes and Goodsell.

Section 536, if it means anything,, means that the plaintiff in such action must be "*the real party in interest*," and must have "*a valid subsisting interest in*" *the land.*

Sec. 536. "Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the District Court." * * *

Plaintiff's Right to Sue.

1. The plaintiff is not a trustee of an *express* trust. No trust is declared—much less *defined.*

The alleged title is held as it is for some equivocal purpose, perhaps a champertous one.

2. Counsel say, "The holder of the legal title to

land is the real party in interest." This may be so, and it may *not* be so.

In this case the proof shows that plaintiff has no beneficial interest, legal or equitable, in or to the land.

Can one holding an absolute deed, as security for a debt, maintain an action to recover possession of the land? In *Murray* v. *Walker*, 31 N. Y. 399, it is held that he cannot.

3. Counsel next cite authorities to the effect that an assignee of a "chose in action" is the real party in interest, and the only proper party to bring the action.

Our statute defines an assignee of a "chose in action" to be,—

"An assignee of any judgment, bond, specialty, book account or other chose in action, *for the payment of money*."

Code, Sec. 15.

Is a conveyance of the legal title to land the assignment of a "chose in action?"

Mills v. *Murray*, 1 Nebraska, 327, was the case of a plaintiff suing on a "claim for rent in arrears" assigned to him by the landlord.

Van Santvoord on pleading under the Code, (p. 109–10) settles the point in question. He states in effect that codes have adopted (with some exceptions) the rule as to parties which formerly existed in courts of equity, by which "the plaintiff must be immediately interested," and the suit could not be prosecuted "in the name of a mere nominal plain-

tiff." * * * "The party prosecuting the suit must be the *real party in interest.*" * * * A mere servant or agent, with whom a contract is made on behalf of another, and "who has no *direct beneficial interest* in the transaction, cannot maintain an action thereon." "But when such agent has any *beneficial interest*, as in case of a factor or broker for commissions," &c., he may sue in his own name. (118.) "And so in regard to actions to recover real property, the beneficial claimant is the proper party," or, under our statute, the person having a "valid subsisting interest" "*and* right to the possession."

Another question is this:

Prior to 1870 each and all of the heirs had sold and conveyed, in severalty, the ten lots into which the west half of the donation claim had been divided.

In 1871 an act was passed "*to make perfect titles to land in Washington Territory*, providing as follows:

"When any person or persons, having sold or conveyed by deed any lands in this Territory, and who at the time of such conveyance had no title to the land * * * shall acquire a title, * * * such title shall inure to the benefit of the purchasers, * * * and the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands * * * ."

See Supplement to Code, p. 25, and Session Laws, 1871, p. 86.

Now, let it be assumed that the heirs had no title to the west half of the claim at the time of making

their deeds, but afterwards acquired title, *in whom did the after-acquired title vest? To whose benefit did such title inure?*

Besides, many of the heirs conveyed their allotment by warranty deeds, and by the general law in such cases the after-acquired titles inured to the benefit of the purchasers.

So, as was said by the court in *McPherson* v. *Cunliff*, 11th Sergt. and Rawle, 422,—

"In general the law is, that the grantor is estopped by his own deed to say that he had no interest, when by a subsequent deed he acquires title. As where an heir apparent, having the hope only of succession, conveys during the life of his ancestor, an estate, which afterwards descends to him, he is estopped to say he had no interest at the time of his grant. These estoppels run with the land into whatever hand it comes."

In another part of this opinion the court said:

"There are legal and equitable estoppels. Legal, where the law estops a man to falsify a juidcial act to which he is a party; and equitable ones which will estop him *from using a title which in good conscience ought to inure to the use of another.*"

And so, Chancellor Kent says,—

"The deed which creates an estoppel to the party undertaking to convey or demise real estate, when he has nothing in the estate at the time of the conveyance, passes an interest or title to the grantee by way of estoppel, from the moment the estate comes to the grantor, and creates a perfect title as against

the grantor and his heirs. The estoppel works an interest in the land."

4 Kent, 98, (12th Ed.) citing many cases.

To the same effect is the case of,—

Corcoran v. *Brown*, 3 Cranch, C. C., 143.

Again, in the present case all the conveyances in severalty of the west half were made before any of the heirs conveyed their undivided interests in the donation claim.

Of course they could not pass any other or greater interest to Whipple than they then held. At that time (1877 and 1878) they held nothing in the west half as against their prior grantees.

Consequently the Whipple deeds conveyed nothing in the west half of the claim.

The Whipple Deeds.

The buying and selling of pretended titles to land, held adversely, has always been odious, and has never been productive of other than baneful results. And the wisdom of that principle of the common law forbidding such transactions, is well illustrated in the present case.

The principle of law referred to is this, that a conveyance by one out of possession, where the land is held adversely to the grantor, is inoperative and void as against the person holding adversely.

Has this wholesome principle of law, sanctioned by the experience of ages, been abrogated by the statutes of this Territory?

This is the question squarely presented in this case.

If it has not been thus abrogated, it is the duty of the courts to uphold and enforce it with a strong hand.

Speaking of this principle of law in *Jackson* v. *Demont*, 9 Johnson, 55, Kent, C. J., says: "This doctrine is by no means a new one, for it has been so frequently and uniformly acknowledged, both in England and in our own courts, that it has grown to be familiar and can not be open for discussion." * * *

"It is no doubt the general sense and usage of mankind that the transfer of real property should not be valid, unless the grantor has the capacity, as well as the intention, to deliver possession, and actually does it."

And he cites Blackstone as saying: The principle prevails in the codes of "*all well governed nations.*"

And in his Commentaries, Vol. 4, 8th Ed., p. 487, Kent says:

"There is one check (in the United States) on the power of alienation of a right or interest in land, taken from the statute of 32 Hen. VIII., against selling pretended titles; and a pretended title, within the purview of the common law, is where one person lays claim to land of which another is in possession, holding adversely to the claim. Every grant of land * * * is void, if at the time the lands are in the actual possession of another person, claiming under a title adverse to that of the grantor."

This principle, it is believed, prevails very generally *in the jurisprudence of this country.*"

The statute of Henry VIII. is only in affirmance of the common law.

2 M'Lean's Rep., 380.

4th Kent's Com. (note) 8th Ed., p. 491.

And the same is true of the statutes of some of the states declaratory of this principle. New York, for instance.

McMahan v. *Bowe*, 114 Mass., 140.

19 Am. Rep., 321.

"The statute of Vermont, which declares conveyances void by reason of adverse possession, is simply in affirmance of the common law."

21 Vt. (6 Wash.), 52.

Kent declares it to be the "established doctrine that the common law of England, and the *English statutes*, passed before the emigration of our ancestors, and applicable to our situation, constitute a part of the common law of this country," "and were imported hither by our colonial ancestors."

Vol 1 Kent, 525, p. 473, 8th Ed.

Henry VIII. ascended the throne in 1509.

The 32d year of his reign was 1541.

Our ancestors landed on the rock of Plymouth in December, 1620.

It is plain, therefore, that this principle of law exists in all the states and territories, except those in which it has been abrogated by *express statutes*, as in Michigan, Oregon, California, and some others.

The Michigan statute (1846) is as follows:

"No grant or conveyance of land, or interest

therein, shall be void for the reason that at the time of the execution thereof, such lands shall be in the actual possession of another claiming adversely."

The statute of Oregon (1854) is in the same identical words.

The California statute (1850) is in these words:

"Any person claiming title to any real estate, may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner and with the same effect as if he was in actual possession thereof."

This shows very clearly that the legislatures of those states considered such an *express* and *formal statute* necessary to abrogate the common law principle above stated.

Besides, prior to the above Michigan statute, the courts of that state held that such principle of the common law was in force there.

Backus v. *Byron*, 4 Mich., 535.

The statement is made in Vol. 20, p. 467, Howard's Rep., that the principle "has not met with favor in the United States."

This is "*dictum*," and is not true in point of fact.

It is disproved by Kent, and by the fact that the principle has existed and been enforced in the following states, and still exists in many of them:

Alabama, Arkansas, Delaware, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, New York, Rhode Island, Tennessee, Wisconsin, Vermont, Virginia, Maryland, Connecticut, and

some other states, also in the District of Columbia.

See 15 Am. Decis., 319, (note). 4th Kent, 490–91, (note), and cases cited.

The case of *Wright* v. *Meek*, 3 G. Iowa, 472, will perhaps be read by opposite counsel, the chief characteristic of which is its "spread-eagle" style of reasoning, better suited to a legislative assembly than a court of justice.

The case was *criticised* and *disapproved* by the same court in *Boardman, et al* v. *Thompson*, 25 Iowa, 487.

The *penalties* formerly annexed to maintenance, as an offense, may have been changed or modified in the United States, but the principle and policy of the law remain; namely, *that no encouragement shall be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.*

The abrogation of such a principle of law will not be worked out by *inference* or *implication.*

Nothing will justify a court in disregarding it but an *express* and *formal statute.*

The courts in this country are bound to enforce all established principles of the common law which are not repealed by statute.

Powell v. *Brandon*, 24 Miss., 342.

Perhaps it may be said that this principle of the common law is not applicable to our situation.

The answer to this is, that is a matter for the *legislature* to consider, and not for the courts.

Dadmure v. *Lamson*, 9 Allen, 85–89.

It may also be said that the principle prevailed in

England in times when the administration of law was weak, and right and justice were often "trodden down" by great men, and the "weak oppressed;" that in our times no such danger exists; that in this country the administration of law is unimpeded, pure and equal.

This latter statement may be flattering to our vanity, and a sweet morsel under our tongues, but unfortunately it is *not true.*

The spirit of lawlessness is as prevalent to-day, and the rights of citizens are as often "trodden down" with impunity, as they were in the profligate days of Henry VIII.

But this wise and wholesome principle of the common law was recognized as in force here by the Supreme Court of the United States when it said:

"Adverse possession may be set up against *any* title, either to make out a title under the statute of limitations, or *to show the nullity of a conveyance executed by one out of possession.*"

Bradstreet v. *Huntington*, 5 Pet., 401.

Hogan v. *Kurtz*, 4 Otto., 776, *where the same language is used*, and cases cited.

In *Bradstreet* v. *Huntington*, 5 Pet., 401–435, the court says:

"After the case of *Jackson* v. *Demont*, it is in vain to contest the point; and the principle is established in various other cases." * * *

"It has been supposed, in argument, that the judge founded his instructions on this point upon the statutes of maintenance. This, however, is not the fact; for it will be seen in the case of *Jackson* v. *Demont*,

and others, that the courts go upon a principle having no relation to the statute of maintenance. They apply to adverse possession the common law doctrine, according to which the deed of one disseized is void."

"Maintenance."

Opposite counsel endeavor to confound "maintenance" as spoken of in 22 Cal., 86, and the common law principle against buying and selling pretended titles to land held adversely.

The distinction between maintenance and the common law principle is pointed out by the U. S. Supreme Court in several cases.

We have already shown that the principle of the common law referred to, was abrogated in California by an *express* and *formal* statute.

See Statute 1850, p. 252, Sec. 34.

The California Court was dealing with an agreement by an attorney to assist another in prosecuting a doubtful claim for a *contingent fee.*

Of what avail are cases of that kind in considering the questions presented in this case?

One who, under a deed purporting to convey in severalty, enters into the possession of land, holds it adversely to the whole world, though his grantor held as tenant in common with others.

Culler v. *Motzer,* 13 S. & R., 356.

15 Am. Decis., 604.

"Color of Title."

The court below found the fact of adverse possession by Defendants. This necessarily included the finding of "color of title" and all other facts necessary to constitute adverse possession.

And we insist, for various reasons before given, that such finding of fact is conclusive until set aside in *that* court.

But we may say that the Supreme Court of the United States has several times defined "color of title" to be, "that which in appearance is title, but which in reality is not."

And the same court has said, "adverse possession under a claim or color of title *void,* is a bar to recovery, if continued twenty years."

11 Pet., 41.

2 Black, 599.

Counsel furthermore tell us that "the statute of champerty was *invented* to prevent transfers of pretended titles to great men," &c.

Judicial decisions and text-writers tell us that the statute of Henry VIII and all other like statutes are only in *affirmance of the common law.*

See 2 McLean, 380.

1 Black 127, and cases cited.

And the *reasons* of such statutes were to preserve and re-invigorate a valuable principle of the common law.

The Statutes.

It may safely be affirmed that there is not, and never has been, anything in the statutes of Washington Territory indicating the semblance of an intention to abrogate this principle of the common law. On the contrary, there is much in them indicating an express intention to preserve it.

On January 31, 1856, an act was passed declaring—

"That the common law, in all civil cases, except where otherwise provided by law, shall be in force."

Laws, 1855–6, p. 7., on last page of this Brief.

Subsequently, and in many places in the statutes, provisions are found declaring "that the common law of England * * * shall be the rule of decision in all the courts of this Territory."

And, by the criminal practice acts, offenses cognizable at common law, if not controlled by statute, are indictable.

Prior to 1856, and ever since that time, the Oregon statute above quoted has been in force, and no reference has been made to it, nor any similar statute enacted by the legislative assembly of the Territory of Washington.

From such evidence of adherence to the principles of the common law by our law makers, can the courts *infer* an abrogation of the principle in question? Certainly not.

Moreover, in this case the plaintiff must allege and prove a "*valid* subsisting" interest, and right of possession in himself. And how can he acquire a "*valid*"

interest and right of possession by deeds inoperative and void as against the defendants?

Words are things; and the words *"valid"* subsisting interest, in Sec. 536, mean something.

They mean such an interest as the plaintiff can assert in *such* an action *in his own name.*

Another thing must be noticed. In 1843, when this Territory was a part of Oregon, an act was passed by the legislative assembly of Oregon containing this section:

"Sec. 4. Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein, in the same manner and with like effect as if he was in the actual possession thereof."

See *"An Act to Regulate Conveyances,"* approved Feb. 16, 1843. Session Laws, p. 138.

See also an act approved Sept. 29, 1849, adopting certain laws of Iowa, *containing the same provision.*

Our statute, passed Jan. 31, 1856, expressly *repealed* the above laws of Oregon, thus leaving the common law principle *restored* and *in force in this Territory.*

See Statute W. T., 1856, on last page of this Brief.

Findings as to Adverse Possession.

Each and all of the heirs were out of possession of the land in controversy at the time they executed and

delivered their deeds to Samuel R. Whipple. (1st Finding.)

At the time said deeds were executed and delivered the defendants were in the exclusive and adverse possession of said land, and had been continuously since April, 1865, until the present time. (2d, 4th and 5th Findings.)

Equitable Estoppel.

The opinion of the court below in this case is not in conflict with the doctrine of equitable estoppel as laid down in 3d Otto., 326, and in 18th Wallace, 271, but is sustained by those cases.

In those cases the court was presenting only one phase of the *general* doctrine, and did not pretend to state the many and various exceptions to the general principle presented.

Commenting on those and the California cases decided by Justice Field, Mr. Pomeroy says:

"Justice Field, in formulating the rules stated, did not announce them as governing "*all cases of equitable estoppel.*"

But the *general* doctrine as stated in 3d Otto., 326, is decisive of this case. That doctrine is this: there must *generally* be some intended deception in the conduct of the party to be estopped, *or such gross negligence as amounts to constructive fraud, or culpable negligence, which, in effect, implies fraud.*"

The definition of equitable estoppel, given by Mr. Pomeroy in his work on Equity Jurisprudence, Vol.

2, p. 262, is more comprehensive, and seems to cover all *phases* and *applications of the doctrine.*

"When all the varieties of equitable estoppel are compared, it will be found that the doctrine rests upon the following general principle:

"*When one of two innocent persons, that is, persons each guiltless of any intentional moral wrong, must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible.*

" * * * *This most righteous principle is sufficient, and alone sufficient, to explain all instances of such estoppel, and although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element.* * * *

"*Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps otherwise have existed, either of property or of remedy, as against another person who has in good faith relied upon such conduct.* * * *

"The conduct may consist of *external acts, of language written or spoken, or of silence.*"

The rule that the party to be estopped must have knowledge of the facts, does not apply in all cases. It does not apply where the party, although ignorant of the real facts, *ought* to have known them.

In such case ignorance will not prevent an estoppel. Nor does it apply to a party who has actively interfered by acts, and whose affirmative conduct has misled another. Nor, even in case of mere acquies-

cence, when the ignorance of the real facts was occasioned by culpable negligence.

Pomeroy's Eq. Jurisp., Vol. 2, 272.
" " " " 273.

There may be cases of such culpability or negligence in the party, that he would not be permitted to set up want of knowledge of his rights, or after he has *omitted to speak at the proper time.*

Again. "In many familiar species of estoppel no *intention* to mislead need, or can possibly, exist."

Pomeroy, Vol. 2, 275–6.

"Acquiescence consisting of *mere silence* may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle, '*if one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.*'"

"And a most important application includes all cases where an owner of property stands by and knowingly permits another person to deal with the property as though it were his, or as though he were rightfully dealing with it, as by expending money upon it, making improvements, erecting buildings, etc., without interposing any objection."

Pomeroy, Vol. 2, 282, and cases.

The case in 5th Metcalf, cited in 14 Cal., 370–1, was a case of conduct and acquiescence induced by a *"mistake of fact," alleged and clearly proved.*

As applied to *married women*, "the tendency of modern decisions is strongly towards the enforcement of the estoppel against them as against persons *'sui juris,'* with little or no limitation on account of their disability." "This is plainly so in states where legislation has freed their property from the control of their husbands." "Even independently of this legislation *there is a decided preponderance of authority sustaining the estoppel.*"

Pomeroy, Vol. 2, 279, and cases.

And as applied to *infants*, Mr. Pomeroy says: "An equitable estoppel, arising from the conduct of a minor, may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property in contravention of his conduct upon which the other party has relied and been induced to act."

Pom., Vol. 2, 279–80.

71 Ill., 380, and other cases.

This statement of the law applies with special force to the conduct of Grant H. Short at the sale of lot No. 7 "encouraging bidders," expressing satisfaction therewith, neglecting to disaffirm, etc., etc.

"Gross negligence," says Pomeroy, "produces all the effects and deserves all the blame of intentional deception."

"If one *refrains* from disclosing his claim, and *suffer* another to deal with his property as his own, he will not be permitted to enforce his claim in preference to that obtained by the person whom he has *suffered to be misled by his silence.*"

Pomeroy, p. 186, Vol. 2 and notes.

This principle, as to "*superior equities*," applies to all the heirs who suffered each other to deal with their allotments in severalty as their own, and to sell and convey them to *bona fide* purchasers for full value, making no claim and giving no notice of any.

Another species of estoppel may be noticed.

"If the vendor, in a conveyance of land, has no title at the date of the deed, but acquires a good title afterwards, the title thus acquired enures to the benefit of the first vendee against a subsequent vendee, who claims by a deed made after the title accrued to the vendor. And the vendor, and all who claim under him, *are estopped* by his first deed to deny that the vendor had title at the date of that deed."

Corcoran v. *Brown*, 3 Cranch. C. C., 143.

"A patent issued to the original beneficiary under a bounty act, who had previously sold and assigned his right, enures to the benefit of the purchaser, and *relates back to the date of the first entry*. The heir of the beneficiary is estopped from setting up a legal title under the patent."

French v. *Spencer*, 21 How., 228.

"An assignment of an invention before a patent is obtained is a good transfer of the right of the patentee when he obains a patent, and he will be estopped from setting up any adverse title."

Herbert v. *Adams*, 4 Mason, 15.

"When one accepts a benefit under an award he is estopped from denying its validity, and it is immaterial whether the award was made under the submission or not."

1 Court of Claims R., 310.

One other case is in point:

The wife of B acquired by descent an undivided interest in a tract of land.

B purchased the remaining interest from the brother of his wife.

B died intestate, and his daughter petitioned the orphan's court for partition. The widow appeared and consented to the partition, and a purpart was awarded to the daughter, who brought an action to eject the widow therefrom. *Held*, that the widow was *estopped* from setting up her title by having assented to the order making partition.

Young v. *Babilon*, 91 Pa. St., 280 (1881).

This would certainly close the lips of Ester Short, if she were now living and making any claim adverse to the partition.

"It is not necessary to an equitable estoppel that the party should design to mislead; it is enough if the act was calculated to, and did in fact, mislead another acting in good faith and with reasonable diligence."

Blair v. *Wait*, 69 N. Y., 113 (1877).

A and B owned lands which they supposed to be separated by an unclaimed strip, and A urged B to make improvements upon that half of the strip nearest his land, A to improve the other half. Subsequently it was ascertained that the strip belonged to A.

Held that A was estopped from claiming the half improved by B.

Woodward v. *Tudor*, 81 Pa. St., 382 (1881).

Again,—As to Curtis F. Short and those claiming under him:

"Where one suffers another to do acts which proceed upon the ground of authority, or by his conduct adopts such acts after they are done, he will be bound although no previous authority existed. * * If he has justified the belief in a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, and that the third party acted upon a mistaken conclusion. *He is estopped to take refuge in such a defense.*"

Robinson's Ex. v. *Chappel*, 12 Wall., 681.

And this applies as well to *all the minors*, who adopted the acts of their guardians affecting their real estate, whether duly authorized at the time or not.

But the estoppel contended for in this case is fully vindicated in *Morgan* v. *Railroad Co.*, 6 Otto., 716, the court saying:

"The principle (estoppel *in pais*) is an important one in the administration of law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been *silent* as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent." (Citing 13 Pet., 107.)

"He is not permitted to deny a state of things which by his *culpable silence* he had led another to believe existed, and who has acted on that belief. The doctrine always presupposes error on one side,

and *fault* or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." (Citing 10 Wall., 604.)

Appellant's Array of Cases on Estoppel.

Boggs v. *Merced Mining Co.*, 14 Cal., 367.
Wythe v. *Smith*, 4 Saw., 17.
24 Cal., 268.
26 Cal., 38.
4 Sawyer, 88.
1 Deady, 396.
86 N. Y., 221., (et cetera.)

The *controlling fact*, proved and considered in all of these cases is entirely *wanting* in the present case, namely,—That the representations, acts, &c., set up as an estoppel, were made and done under *a mistake of fact.*

For example, take the case of *Boggs* v. *The Merced Mining Co.:*

Fremont held a right in and to a *floating* Mexican grant, not confirmed or *located.*

Acting on the supposition that it would be so located as not to include the vacant public land occupied by the Mining Co. in the same county, he made certain declarations and disclaimers tending to encourage the Mining Co. in making improvements on the public land occupied by it.

It turned out finally that the decree of confirmation and survey of the *floating* grant included the

lands thus occupied by the Mining Co.. contrary to Fremont's expectations and *private* survey.

The previous declarations, acts and conduct of Fremont were set up by the Mining Co. against Boggs, his grantee, as an estoppel *in pais.*

An extract or two from the opinion will show the controling fact and consideration in the case.

"A party is not to be estopped to prove a legal title to his estate, by any misrepresentation of its locality *made by mistake.*" * * *

"And it would be most unjust that a party should forfeit his estate by *mere mistake.*" * * *

"The previous representations and disclaimers were clearly made under a *misapprehension* of his rights." * * *

"There is no such thing as an estoppel *in pais* for neglecting to speak or act, where the party did not know the facts, which, if known, would have made it his duty to speak or act."

In 5th Metcalf, 479, the court stated in its opinion,—"That it decided the case on the ground that the demandant had acted fairly, *under a mistake,*" "and had made no declarations contrary to his honest belief, or with any intention to deceive."

So, in the case in 26th Cal. The court says,—"The statement that Broderick made, to the effect that he had no claim to the lot, was *a mistake of fact,*" "not made with any intent to deceive, nor with gross carelessness or culpable negligence."

So, in *Wythe* v. *Smith*, the very thing happened, which might have happened (but did not) in the present case—a division of the Donation claim by

the Surveyor General, *different from the expectation* of the settler when the representations were made,—another *mistake of fact*, not made with any intent to deceive.

In *Wythe* v. *The City of Salem*, 4 Saw., 88, the Defendant *admitted* that Plaintiff was owner in fee of the land, and set up some vague declarations of Cloe A. Wilson of a dedication to public use, made probably under a "misapprehension of her rights."

"As to the case of *Wythe* v. *Smith*, 4 Sawyer, 17, there is nothing in that case, or *in any other case*, to justify the sweeping denunciation of all judicial decisions since 1815.

It was a plain case of *mistake of fact innocently made*, and did not call for a denunciation of cases having no resemblance to it whatever.

We thus see that the rules announced in the foregoing cases are to be applied, and were intended to be applied, *only in a particular class of cases*, and that the cases cited present only *one phase* of the doctrine of estoppel *in pais.*

We thus see that "Justice Field, in formulating the rules stated, did not announce them as governing *all cases of equitable estoppel.*"

Pomeroy's Eq. Jurisprudence, Vol. 2 supra.

In the present case *where is the mistake of fact?*"

We have the representations, the acts, the conduct, of the heirs. Their recorded representations and acts assured purchasers and others that they were *owners* of the West half of the Claim.

Such was and is the fact.

The same record assured purchasers that the heirs

were holding and claiming and conveying *in severalty* their allotments.

Such was and is the fact.

Again we ask, *Where is the "mistake of fact?" Where the "misapprehension of their rights?"*

The Donation Act under which they claimed informed the heirs of their rights; and although they *might have been* mistaken as to the division of the Claim and locality of their rights, yet the fact was and is they were *not* mistaken, and did not misapprehend their rights.

Is it not plain, therefore, that the cases cited by counsel, have no application to the case now before this court?

"Representations."

Counsel also tell us that,—"No representations were made to the appellees, at the time they purchased, as to the condition of the property or *claims* of the heirs."

To this we reply,—The proceedings in partition—the survey and plat, "agreed to" by all, showing owelty paid and received, had been standing of record in Book of Deeds in the County Auditor's office for ten (10) years, as a perpetual "representation" and assurance that partition had been made and carried into execution.

That each and all of the 10 children were claiming and holding in severalty and exercising acts of ownership in accordance therewith, and receiving benefits therefrom.

That most of them had sold and conveyed their allotments for full value to third persons whose deeds were of record, no one objecting or making any claim otherwise than according to the partition as made in 1856.

That Grant H. Short had borrowed money and executed a mortgage on Lot 7, and had once executed an absolute deed of said Lot.

Add to this his active participation in the proceedings to sell, and his encouraging bidders at the sale.

Could "representations as to the condition of the property or claims of the heirs" be made in a more effectual way than this? Were not these representations knowingly made?

Can one cause another to believe in the existence of such a state of things, and then be permitted to reap profit by avering that a different state of things existed at that time?

What was said in a case of parol partition, reported in 44 Am. Decisions, 554, is applicable in this case, and we cannot "forbear" quoting from the opinion,—"in some of the States doubts have been expressed, whether in case of real estate, the estoppel must not be by deed. This certainly is not the common law." Littleton says, "and so a man can see one thing in this case, that a man shall be estopped by *matter in fact*, though there be no writing by deed, indenture or otherwise."

"And Coke gives as an instance of estoppel by *matter in fact*, this very case of *partition*."

And the court said,—"Cases are numerous in this

country where a person has asserted a fact, upon the faith of which another acts, and will receive damage, if that fact is not true, where it has been held that he should be estopped from contradicting it."

And Judge Deady (4 Sawyer, 26,) states the instances given by Coke of estoppel by *matter in fact,* as "livery—acceptance of rent—*partition* and *acceptance of the estate.*"

The argument made in the case in 44th Am. Decisions was the same as is made by opposite counsel in this, that the statute provides how partition may be made, and how conveyances shall be made, and that, as no such partition, or conveyances have been made. the heirs are, therefore, tenants in common.

But the court thought and held differently.

See also *Shelton* v. *Alcox*, 11 Conn., 240, and cases cited.

It is plain that the heirs in this case were not acting under any *mistake of fact*, behind which they or their grantees can take refuge.

It was and is a fact that, at the death of Amos M. Short in 1853, the widow and children became owners in fee and tenants in common of the Donation Claim, and continued to be such until 1856.

That they were in possession in 1856, claiming to be owners and tenants in common.

The fact was and is that they agreed upon a division of the Claim. That they made and agreed to a partition of the West half, and caused a record of it to be made.

That they ever afterwards held and claimed in accordance therewith.

That for more than 20 years no one, except Leander Holmes, ever disputed the fairness or validity of the partition.

That since 1856 conveyances have been made to third persons of all the Lots in accordance with the partition.

That a patent certificate and Patent finally issued making a division of the Claim *in accordance with* the one agreed upon by the owners.

And here we refer again to the doctrine of *relation* as laid down by Field in 15 Cal., 366, to the effect that the Patent is to be regarded as if it had issued at the date of compliance by the settler with the conditions of the grant.

Also *French* v. *Spencer*, 21 How., 228. (directly in point.)

It was *fortunate for all* that the patent certificate divided the Claim as it did.

Had the division have been different, nothing could have saved the partition; nothing could have saved the purchasers under it; nothing could have saved the Defendants in this case.

Partition proceedings—surveys, plats, deeds and records—all would have gone into one sepulchre.

But as it was and is, nothing can shake the partition, and nothing can shake the title of purchasers under it.

"If one man has made a representation which he expects another may or will act upon, and the other

does in fact act upon it, he is estopped to deny the truth of the representation."

50 Vt., 116, 118.

Knowledge of Their Rights.

The heirs of Amos M. Short *claimed* to have and did have a knowledge of their rights. From 1853 to 1856, they claimed to be owners and tenants in common of the West half of the Donation Claim.

A Patent from the United States has verified their claims, and proved that they were acting under no "mistake of fact," or "misapprehension of their rights."

In 1856 they claimed the right to make, and did make, partition, and caused a record of their doings to be made, on which all have acted, and which all have knowingly accepted, adhered to, ratified and confirmed.

And who has ever disputed, or ever can dispute their right to do these things?

And, who has ever been heard to allege ignorance of facts, or ignorance of law, except Holmes, Whipple & Co., who participated in the *pretended ignorance* of the heirs, when they purchased Lots 3 and 4 in 1856–60, as a legacy for their children, the title to which they believed could never be questioned?

They were among the first to contribute their mite to *deceive* and *mislead* others, if the claims now set up in their behalf have any validity in law or equity?

None of the heirs, old or young, can allege (or

ever have) want of *notice* of what is of record in the Probate Court and Auditor's office of Clarke county.

All of them are, and were chargeable with notice thereof many years ago.

Robert v. *Marvin*, 27 Mich., 306.

If the proceedings in the Probate Court were originally *void*, as a *judicial* partition, the parties thereto are estopped by their subsequent acts and conduct from denying their validity, and so are their grantees.

If void as a *judicial partition*, said proceedings are valid and binding as a *voluntary parol partition*.

If invalid as a voluntary parol partition, the separate conveyances in severalty produced a valid and binding partition.

These propositions are sustained by all the authorities. They all concur without a dissenting voice.

The argument of opposite counsel is *fallacious* from beginning to end.

To allow the heirs of Amos M. Short, or their grantees, to deny the validity of the partition at this day, would be to sanction an act of "Punic faith" surpassing the treachery of the Carthaginians.

Grounds of the Appeal.

Specification No. 1.

The petition of Esther Short for letters, the inventory and other papers relating to her appointment, etc., were admissible in evidence for several purposes, such as—

1. To prove that Amos M. Short was a resident of and died Jan. 9, 1853, in Clarke county, W. T.

2. To prove that he left estate therein, its kind, value, etc., and that the Probate Court of Clarke county had jurisdiction to appoint an administrator of his estate.

3. To prove that he left a widow and children—their names, ages and residence, etc.

4. To prove that Jerusha Shockley, Druzilla Burlingame, Samantha Morse and Matilda Lawrence were children of Amos M. Short.

5. That Burlingame was administrator *de bonis non*.

6. To show other collateral facts tending to establish facts in issue.

Specification No. 2.

The proceedings in partition were admissible as showing—

1. The existence of certain facts in the light of which the subsequent acts and transactions of the parties thereto must be viewed.

2. That they voluntarily appeared, participated in the proceedings, agreed to, adopted and acted upon the partition as made. That owelty was paid and the partition made equal, etc.

3. Showing acts and things done, which were ratified by the minors after coming of age, and by the other heirs.

4. As showing that all claimed to be and were tenants in common before partition was made, and that none of them claimed otherwise than in severalty afterwards.

Specification No. 3.

The Probate Court was *competent* to appoint a guardian of the person and estate of Grant H. Short; and the legality of such appointment cannot be *collaterally* impeached in another tribunal.

Publication of "Notice to show Cause" is not essential to the *jurisdiction* of the court in such cases, and the order of sale "is not rendered invalid by an insufficient publication."

11 Otto, 417.

3 Wall., 396.

"The granting of the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken. * * * The purchaser is not bound to look beyond the decree; if there is error in it of the most palpable kind, * * * * or if the court has disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error."

"These principles are settled as to all courts of record which have a general original jurisdiction over

any particular subjects; they are not courts of special or limited jurisdiction in the technical sense of the term." * * * "These principles have been applied by this court to sales made under the decrees of orphan's courts." * * * "If the purchaser (under a decree of the orphan's court) was responsible for their mistakes in point of fact, after they had adjudicated upon the facts, and acted upon them, those sales would be snares for honest men." (Citing 2 Pet., 165.)

"The purchaser is not bound to look farther back than the order of the court."

"The decree of an orphan's court in a case within its jurisdiction is reversible only on appeal, and not collaterally in another suit."

It is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court, as an authority emanating from a court of competent jurisdiction."

Citing 2 Pet. again saying "in that case the jurisdiction of the court was held *to attach when the deceased dies intestate, and any of the persons entitled to his estate is a minor.*"

Grignon's Lessee v. *Astor et al.*, 2 How., 340–342.

Specification No. 4.

A parol agreement concerning land, *carried into execution*, may be proved by parol evidence.

The Statute of Frauds does not prevent parties from a voluntary performance of their parol agreements, and has no application to agreements which have been performed on both sides.

Specification No. 5.

The plaintiff claims title under *all* of the heirs of Amos M. Short.

Why, then, should not evidence be admitted to prove that *all* have ratified the partition?

Does not a ratification by all affect Grant H. Short and his grantees?

Do not the deeds of each in accordance with the partition "*operate as an estoppel as against the grantor, and those claiming under him?*"

Specification No. 6.

The cases cited heretofore determine the *effect* of the acts and conduct of Grant H. Short as to lot No. 7, and are decisive as against him and the plaintiff.

While a minor—20 years of age—Grant H. Short mortgaged lot No. 7 to Beatty, and subsequently he sold and conveyed it by deed, he and his wife and guardian all signing the deed, which was afterwards set aside.

At the guardian's sale he was present "*encouraging bidders*," etc. He was a participant in all that was done, signing receipts, approving of the sales, and of the application of the proceeds.

And, then, after attaining majority, and for more than 12 years he not only acquiesced, but stood by in "*culpable silence*," seeing the defendants improving and erecting buildings on the land without a murmur of objection. Conscience sealed his lips for 12 years, and a court of equity will seal the lips of his grantees forever.

Their mousing through records for *technical defects*

only informed them of *inherent equities* in the title of the defendants.

Specification No. 7.

The position assumed by opposite counsel on this point wholly obliterates Sec. 536 of the code, and requires no further answer.

Specification No. 8.

The "findings" of the court below are "deemed a verdict," and may be set aside in the same manner, "and a new trial granted.

Code, Secs. 246–247.

"In the absence of a bill of exceptions, setting forth evidence, no error can be assigned in respect to facts found by the Court when the parties waive a trial by jury."

Prentice v. *Stearns*, 113 U. S., 435.

B. F. DENNISON,
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RUFUS MALLORY, of Counsel.

OPINION

Of the Supreme Court of Washington Territory, by Greene, C. J.

The first step towards deciding this cause is to determine clearly the nature of what takes place between the United States and its donee, when proceedings are had under the Oregon Donation Act to establish title in the latter. By the act, there "is granted" to every man of a certain description—or, if he has a wife, then to him and her, in equal parts, as shall be set off to them severally by the surveyor general—a tract of land not to exceed a certain area, on condition that the same shall be selected in a certain way, and in consideration that it shall be resided upon and cultivated a certain length of time. This grant is subject, however, to the qualification, that if husband and wife have complied with the provisions of the act, so as to entitle them to the grant, and either of them, before patent has issued, shall have died, intestate as to his or her share, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the decendent in equal proportions. Throughout the transaction, the United States holds the position of seller and the donee that of purchaser. As soon as the necessary selection has been made, and the prescribed residence and cultivation completed, the transaction is closed, as far as bargain and sale is concerned. Nothing remains but to assure the vendor, or the vendor's agents, the officers of the Land Office, that as a matter of fact the grant has become effective, by meeting a fit grantee who has rendered the proposed consideration, so that they may furnish the grantee with good and sufficient evidence of his title. Final proof, so-called,

is no part of the consideration which the grantee gives, but is merely evidentiary matter, provided for the purpose of satisfying the Land Office that the right of the grantee is perfect and entitles him to a patent.

The act, and not the patent, is the instrument which works the transfer of title. Its language is unmistakably, "there shall be and hereby is granted." One conveys, the other evidences title. The patent is but a formal and solemn piece of evidence, that all things essential to be done under the Donation Act before passage of title have been done, and that therefore, under the act title has actually passed out from the United States into the donee. Act and patent together fulfill all the functions of an ordinary deed of conveyance. The two together both convey and evidence title. The patent merely evidences, and does no more; but the act evidences to a certain extent only, and then, over and beyond that, does alone and perfectly convey. When patent issues, it relates back to and combines with the act, as of the date when a fit grantee rendering full consideration appeared, and so as to form with the act a perfect muniment of title. Title under the Donation Act, therefore, is always complete before patent issues, and the patent issues by virtue of title completed, and not otherwise.

In the case at bar, the widow and heirs, if they have acquired any title at all, have got it under the Donation Act. Their patent so recites, and neither they nor any grantee of theirs can, while claiming under that patent, deny it. They are estopped from saying, to the predjudice of any grantee of theirs,

but that the husband and ancestor, Amos Short, deceased, duly resided upon and cultivated, for the prescribed period, the Donation Land Claim known as his, or that by virtue of a full compliance with the essential requirements of the Donation Act, his widow and children were at the date of his death, in January, 1853, entitled under the act to that Land Claim. Such being their situation, the great question of this case is: Has that title, as to the parcel of land herein dispute passed, by reason of their acts, from them to the appllees?

All provisions of the Donation Act necessary and precedent to the passage of title, had been complied with prior to 1855, and the widow and children then held among them, undivided, all disposable interest in the land.

In that year or the next, as appears from the evidence, they agreed to, and did as far as they could, divide the claim into halves, an east half and a west half, assigning to the widow the east and to the children the west. This, of course, was subject to whatever decision the surveyor general might make, in determining where the division line might be drawn.

Assuming that the surveyor general would affirm, or fall in with this division, and that the west half would by him be set off to them, the children afterwards, in 1856, undertook to procure a further division among themselves of that half. To effect this, those of them who were of age applied personally, and those not of age by guardian, to the Probate court for a partition. Pursuant to or connected with that application, a partition, at least in form, was made or sought to be made by the court. Consid-

ered as a judicial proceeding it was doubtless void, except in so far as it engaged the court in supervising and sanctioning the acts of the participating guardians. But the formal partition all the heirs willingly made actual and substantial, by each, personally or by guardian, spontaneously taking possession and dominion in severalty of his or her portion, and by mutually paying and accepting owelty sufficient fully to equalize all the allotments. Was it in fact, then, valid or void?

It is argued by appellant that it was void, for three reasons: 1st, Because the guardians acted without authority, and have never had their action affirmed by their wards since the latter became af age; 2d, Because it was by parol and not by deed; 3d, Because that half of the Donation Claim which the heirs undertook to sub-divide had not yet been assigned to them by the surveyor general.

As to the first objection, the assumption that the guardians acted without authority is not borne out by the records. They were in presence of that court which had peculiar and general jurisdiction over them; they were parties to the petition for partition among the children; they proceeded, in the partition among the children, on the basis of the previous partition between the widow and children; they acted throughout under the eye of their supervising court; and their action, after all was done and with everything in full view and fully understood, was solemnly ratified and confirmed by that court. If a partition may be compelled, it may also be voluntary. In a voluntary partition proposing to set apart the shares of the minors, those who have charge of the

estates of the minors have power to act for their wards, under supervision of the court which has the estates in charge. Whether they act with due authority to bind their wards, can be seen by inspecting the record of the court. If they act with judicial authority, they bind their wards, otherwise not. Where the record shows that the matter which the court considered was within its jurisdiction, and all necessary parties were before it, there the action of the court, however irregular, is proof against collateral attack.

But, even admitting that the guardians acted without authority, the wards on coming of age were not absolutely obliged to reject what their guardians did. They had an election. Within a reasonable time they could affirm or disaffirm. If within a reasonable time after reaching majority, they did not disaffirm, they thereby affirmed. In the case before us, their acquiescence since becoming of age has continued for periods varying from eight to twenty years. Having assented, for so many years of their majority, to both partitions, they are now forever bound by both.

To the second objection, we answer that a parol partition, which has been actually consummated by possession and dominion in severalty, and which has been confirmed by long continued acquiescence and by many changes of title, ought not to be and will not be disturbed in equity. There are cases holding that it affords a legal title in severalty, even in face of a statute requiring transfers of realty to be in writing or by deed. But we do not need to go that far. Possession and dominion, initiated by consent, have been held adversely under these partitions for

a quarter of a century. Guardians under supposed authority of the proper supervising court have undertaken to bind their ward's interest. Wards, on becoming of age, have affirmed by long acquiescence and many of them by express acts, the doings of their guardians. Estates have passed for full values into the hands of purchasers. Costly improvements have been made in full faith of the stability of what has been done. The strongest possible inter-lacing equities now bind the parties to remain henceforth forever fixed in their relative positions.

To the third objection, the familiar principle applies, that where one has, by bargain and sale, for valuable consideration which he has actually received and enjoyed, undertaken to dispose of a proprietary interest which he had not at the time, but afterwards acquires, his acquisition of it enures to the use of his *quondam* vendee. If the action of the surveyor general had been such, that these heirs could never have, each of them, an undivided tenth of the west half to dispose of, then their partition would have turned out to be, indeed, an empty affair. But so it happened, that the award of the surveyor general to the heirs in 1874, exactly coincided with their appropriation for themselves and partition among themselves of 1856. Their titles have fallen just along the lines and into the spaces, which, for mutual and valuable considerations, long ago paid and spent, they had intelligently and advisedly marked out and provided. To the meeting of their own minds it was only necessary to add the mind of the surveyor general. In 1874, before their minds had drawn apart, his was added, and then therefore, by relation

of his award back to 1856, no one yet dissenting, the partition, so far as this aspect of it is concerned became perfected.

Under these partitions, Grant H. Short, one of the minor children, became invested with and possessed of a share of the west half, known as Lot No. 7, which is the land in controversy. He held and dealt with this lot as his until 1865. In that year, while he was still a minor, his guardian who was one of his brothers, acting under direction of the Probate court, sold it to the appellee, Nicholas Schofield, for Seven Hundred and Eighty-five dollars, a fair price for it. This sum was applied, by direction of the Probate court, in payment of a mortgage debt upon the premises and of other debts proved and allowed against the minor's estate. Next year Grant H. Short attained his majority. After twelve years of silence, he, in 1878, gives appellant's grantor a quit claim deed of all his right, title and interest in the Donation Claim. About the same date, the rest of the children gave to appellant's grantor similar deeds as to their respective interests. Meantime appellees have put upon the premises permanent improvements of great value.

Now, the appellant contends that this last guardian's sale was void, for reasons reducible to two: 1st, because there was no certain description of the property to be sold in the petition for sale; and 2d, because no notice was given, such as the order of court and the statute required. True, the proceedings before sale show irregularities; but they were not, in our opinion, such as open the decree confirming the sale to collateral attack. Enough is in the

petition to show that the Probate court was asked to act upon a definite matter within its proper jurisdiction. In all that it did from the petition to the decree of confirmation, it was a court of record acting within its proper sphere, and however erroneous in action and however liable to be reversed on error, it is entitled to have its adjudication stand impregnable until so impugned.

But if we regard the judicial proceeding as invalid, our attention is arrested by the fact that the ward and all others interested have let at least twelve years go by without offering to question it, during eight of which years every one of them had been of full age. Entire though tacit acquiescence for such a length of time equivalent to most solemn express affirmance. From twenty-one to thirty-three years of age, in full possession of his faculties, well aware of all the circumstances, Grant H. Short has lived along, without allowing to escape him a single intimation disapproving the act of his guardian. The other children, during the same space, but for different periods of majority, have done likewise. They have thus, every one of them, thoroughly and forever estopped themselves from disavowing that act.

In conclusion, we will say, that in our opinion, the decision of this whole case may be satisfactorily planted on the doctrine of estoppel. If there be such a thing as estoppel, by failure to make objection within a reasonable time, to doings done colorably in one's own name, and whereof he has had the benefit, and which are susceptible of being ratified because bearing fruits capable of being legitimately enjoyed, then this is the case, as seems to us, where

that estoppel occurs. Appellant could at the most recover only the interests of the heirs not estopped. His case is strongest where he represents the minors, and among them it varies in strength in proportion to their length of non-age respectively after their father's death. But the youngest child was eight years of full age before he ventured by quit claim deed, or in any other way, spontaneously or on solicitation, to object to what had been done for him by guardian at periods varying from thirteen to twenty-one years previously. The very youngest of these children has slept on his alleged rights too long to be heard now to press them in a court of equity.

Let the judgment of the District Court be affirmed.

LAWS

OF THE

TERRITORY OF WASHINGTON.

1855–6.

AN ACT

TO REPEAL THE LAWS OF OREGON TERRITORY, NOW IN FORCE IN WASHINGTON TERRITORY.

SEC. 1. *Be it enacted by the Legislative Assembly of the Territory of Washington*, That all laws, heretofore in force in this Territory, by virtue of any legislation of the Territory of Oregon, be, and the same are hereby, repealed: *Provided*, That nothing in this act shall be so construed as to change any county seat, or county lines, established by said laws of Oregon, or to render invalid any proceeding commenced under and by virtue of said laws: *And provided, further*, That the common law, in all civil cases, except where otherwise provided by law, shall be in force.

SEC. 2. This act to take effect and be in force from and after its passage.

Passed January 31, 1856.

On Motion to Dismiss the Appeal, Appellant objects to the Motion for the reasons assigned.

Because,

1st. A statement of the facts of the case, called findings of the Court, was directed to be prepared and was so prepared by the defence, and signed by the district court "yes" or "no." (See Record, page 21–24.

II.

The District Court, in its opinion, held as *conclusions* of law—

1st. "That the probate court partition proceedings of 1856 were void and of no effect as such; which was sustained by the Supreme Court."

2d. "That the *legal title* to the land in controversy is in the *plaintiff*;" which conclusions of law should have been stated as *findings of fact*, and will be treated by this Court as findings of fact under the act of 7th April, 1874.

Eiders *vs.* Boatman, 111 U. S., 356.

III.

I think all other material facts, not specially found by the Court below, are alleged and admitted in the pleadings.

IV.

The Supreme Court must have adopted the findings, opinion, and judgment of the District Court, by holding in its opinion that the decision of this case may be planted on the doctrine of estoppal, and affirms the judgment of the District Court. (Record, 32–33.)

V.

On pages 25, 26, and 27 of the Record may be found a copy of the notice of appeal and an assignment of the grounds of appeal, and error is assigned in all the findings of the first series, except f

the 1st, 3d, 6th, 10th, 11th, 12th, 17th, and 18th, and in all the findings of the second series. All the findings of the District Court were thus before the Supreme Court, and must have been adopted by it.

VI.

The certificate of the clerk shows that the transcript in this case is a true copy of the findings of the District Court. (Record, p. 38.)

VII.

It is not necessary that the transcript should contain all the proceedings nor the evidence that was before the court below.

It is also shown by the Record, pages 25, 26, 27, that plaintiff below, at the time of the trial, excepted to the ruling of the court on the admission of all the evidence introduced on the part of the defense, and in the notice of appeal to the Supreme Court of the Territory plaintiff did assign as grounds of appeal errors of the court in admitting such evidence, and set forth in what the errors consisted. So that there is no question of the kind and character of the evidence introduced and excepted to at the time.

In the notice of appeal exceptions were taken as to the erroneous findings of the court, and set forth in what the error consisted.

The counsel, in his brief and argument, sees fit to set forth a correct statement of the *evidence* introduced by them and allowed over our objections, as may be read on pages 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 38, 39, and 40 in his brief and argument, which facts were introduced by the defense as evidence and allowed by the court over the objections and exceptions of the plaintiff below; which we are willing to admit as a correct statement of the rulings of the court on the admission or rejection of evidence under act of Congress of 7th April, 1874.

VIII.

But in view of the question raised by appellant in this appeal, it is immaterial as to the action of the courts below; for we hold and feel sure we can satisfy this court of the "*total insufficiency*

of the amended answer to constitute a defence to this action of any description," and should we be sustained as to that insufficiency of the amended answer and defence, then it matters not what the defects of the trial, the decisions, the findings, and decrees of the courts below were. They must fall to the ground with the insufficient allegations of the equitable defence; for on the allegations contained in that separate answer and defence are based all the rights of these appellees either at law or equity.

Therefore appellant asks to be heard on his brief and argument.

LEANDER HOLMES,
Attorney for Appellant.

fo

No. 114.

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN W. BRAZEE, *Appellant*,

vs.

NICHOLAS SCHOFIELD AND MARY SCHOFIELD,
Appellees.

Should the Court be disposed to hear the argument in this case, the attorney for appellant submits the following reply to the brief and argument of appellees:

I.

It will readily be perceived that the counsel for appellees stands by the assumption that Amos M. Short was the *donee* of claim No. 51 under the donation law of 27th Sept., 1850—at the time of his death, in Jan., 1853—notwithstanding the fact that in his answer he pleads and alleges that said donation claim was taken by Esther Short on the 4th day of Oct., 1853, about nine months after the death of Amos M. Short. (Record, p. 5.)

II.

And alleges and claims that the title of appellees is derived through a probate court partition proceedings of the *real estate* of Amos M. Short in 1856. (Record, p. 6.)

III.

But what is more strange is, that the courts below actually *ignore* this allegation, and treat the claim of Esther Short as the claim of Amos M. Short, and *that* in the *face* of the pleading and of the *decisions* of this Court and of the *law*.

IV.

We readily admit that if this land claim No. 51 had been taken by Amos M. Short in his lifetime by giving the *required notice* and complying with other conditions of the act, then, on

his death, his rights as a settler would enure to his wife and children as donees of the United States under the 8th section of the act of 27th September, 1850, without further *notice*, residence, or cultivation. In that case the argument of the attorney for appellees (and his authorities) would be in point as to the rights of his children at the time of his death.

V.

But for their attorney to allege in his amended answer that this land claim was taken *after* the death of said Short by another party, to cure the *neglect* of said Amos M. Short, by showing that he was *competent* to take said claim, (as many others were,) only exhibits the disengeniousness of the pleader to befog the case. The answer shows upon its *face* that Amos M. Short never took said claim in his lifetime, and thus caused his widow to thereafter file her notification with the Surveyor General for this claim for herself, as she did, under the act of 14th Feb., 1853, or all would have been lost to her.

Yet the Supreme Court of the Territory holds that "residence and cultivation for the prescribed period by Amos M. Short, the husband, were sufficient." For the court says, "his widow and children were at the date of his death, in January, 1853, entitled under the act to that land claimed." (See Opinion, Record, p. 29.)

VI.

And the attorney for appellees stands by that position, and shows very plainly and conclusively that if said Short at the time of his death had taken this land as required by the act, then said land claim would, under the law, have enured to his widow and children. We admit it.

But the answer shows that said Amos M. Short never became even a *settler* under the law.

See Fitzpatrick *vs.* Dubois, 2 Saw., p. 437.

So I shall attempt no further reply to all that portion of the brief and argument of the attorney for appellees.

On page 37 of the brief of the counsel for appellees is to be found the only notice he deigns to give to the fact that Amos M.

Short never filed a notice for a claim, (*within the time fixed by the act,*) as he says; then graciously calls our ignorant attention to the act of Congress, approved June 25th, 1864, declaring that "a failure to file such notice *within the time fixed* shall not work forfeiture."

U. S. Statutes at Large, Vol. 13, p. 184.

This, may it please the Court, is disengenuous. Knowing that we claim their answer shows that Amos M. Short never filed a notice for said claim *at all.* That he died without filing on said claim at all, and that by such *neglect* was lost the benefit of residence and cultivation, however long prolonged. That *his* neglect was the *neglect* of wife and children. That he left no claim. The act of 25 June, 1864, only gave him and others the privilege to make their filing after the time fixed had expired. Claimants were *not released from filing*, but the time for filing was by that act extended beyond the time fixed by the previous law.

But, unfortunately for these appellees, Amos M. Short also failed to return and take advantage of that generous law. He should have known that by foolishly dying before notifying the Surveyor General of his desire for a claim, that his wife and children would be cut off from claiming any right or interest in the land through him.

But the widow was bound that death should not play such tricks on her and her family. So she filed on 640 acres of land, 320 acres more than under the law she was entitled to take.

See 22 Sec. of the Donation Act, approved February 14, 1853.

The attorney further says (p. 37–38): When the *husband* has completed the four years' residence and cultivation, the wife, or, in case of his death, the widow, becomes the "claimant" and owner of one-half of the land, and *may file notice* and make proof of compliance with the conditions of the act, and refers to U. S. *vs.* Tichnor, 8 Saw., p. 149.

Now, may it please the Court, this is not a correct quotation of the decision. It is a misquotation of the language of the Court, leaving out a whole qualifying sentence and adding a sentence not found in it. The language of the Court is—

"When the husband, *as a settler thereon under the Donation Act* has completed the condition of residence and cultivation, the title to the land would enure to him and his wife in equal parts."

"*And may file notice*" is not in it. Let us read what the Court says in that case (8 Saw., 149.)

The case of Fitzpatrick *vs.* Dubois holds that a "*settler*" under the Donation Act is one who has taken his claim by filing his notification with the Surveyor General, as required by the 6th, section of the act, and without that notification he has no interest in or relation to tne land. (2 Saw., p. 435.)

In 1855 Esther Short turned over to her children the half of the land she had located *as the part* belonging to their father, retaining all she had a right to file on under the law for herself. The children, being ignorant and mostly minors, thought it all right, and in 1856 had a *probate court* partition of that land, called the "*west half*," as the *real estate* of their father, Amos M. Short, as is set out in the sixth separate answer and defence of appellees. (Record, pages 5, 6, 7, 8, 9, 10, and 11.)

But in all sales and all deeds that any one of these children ever gave to any purchaser from 1857 to 1870 no one ever executed any deed but a simple quit-claim or bargain and sale deed of his or her right, title, and interest in the land thus partitioned and allotted to him or her by the probate court of Clarke Co., W. T., in 1856.

From which it is plain that neither the probate court partition proceedings of 1856, nor any oral partition that was or might been made by these heirs or children at *that time*, nor the quit-claim or bargain and sale deeds of the partition allotments by these heirs as alleged in the answer, nor no other act or conduct of them as alleged by appellees prior to their investiture of title, can operate as an *estoppel* against asserting their *after-acquired title* in 1877.

Because,

1st. During all this time these heirs had no interest in or right to this land.

2d. That during all this time the west half of said alleged claim was *public land* of the United States.

3d. Because the allegations of the answer do not set forth a single fact, act, or deed of Amos M. Short in regard to this land, which, under the law and the decisions of this Court, gave him any right as a donee under the act of Congress, 27 September, 1850; hence the *total insufficiency of the sixth separate answer and defence to constitute a defence to this action of any description.*

And if the allegations of the sixth separate answer is insufficient to constitute a defence, then all the other separate defences as to title and right of title of appellees must fall with it: for the sixth sets out fully all that ever took place in regard to this land by Amos M. Short, by Esther Short, by the probate court, and by the Short heirs. And if appellees have not the legal title, they have nothing; nor can they claim any right or title under *this answer* through *Amos M. Short, legal or equitable.*

The doctrine of relation back under the allegations of the answer in this case we have fully given in our main brief and argument. (See pages 25, 26, 27, and 28.)

Nor do we deem it necessary to add anything more in regard to the claimed equities of appellees, or as to the law in regard to the doctrine of estoppel, or equitable estoppel arising out of anything alleged in the equitable defense.

Other Questions.

Under the above head (pages 51–54) counsel for appellees claim that "appellant had not the right to sue or maintain this action, because he was not the real party in interest." All that we need say in reply is to refer to the decision of this court, (92 U. S., R., page 171,) wherein this court "holds that where the want of parties does not appear on the face of the bill (or complaint) the objection must be set up by plea or answer, and cannot be made for the first time in this court, and holds it is unnecessary to make the *cestui que trust* parties." But we will add:

In the case of Smith *vs.* City of Portland (Federal Reporter, vol. 30, pages 737–8) Sawyer, Judge, says: "The bill shows the

legal title to be in the complainant, and this, without anything more, is sufficient to entitle him to a decree;" and further adds: "He would be entitled to the relief, without the allegations of the trust, whether a trust exists or not; and he would be entitled to the same relief with the allegations of the trust if proved. On either hypothesis he would be entitled to relief." So that objection disappears.

Act of 1871, p. 54.

The next stand the learned counsel takes is an alleged act of the Legislature of the Territory, set out as follows: "When any person or persons, having sold or conveyed by deed any lands in this Territory, and who at the time of such conveyance had no title to the land, shall acquire a title, such title shall enure to the benefit of the purchasers."

This act, if it ever existed, must have been repealed, for it is not in the Code, or if unrepealed, the Code commissioner must have treated it as too foolish to be included in it, for it could not change the universal decisions of courts as to the scope and power of the different kinds of deeds. As to whether a deed conveys any interest in land or not, is determined by the *deed itself*, and not by such a *brilliant act* of *legislation*.

As to the power of a quit claim or bargain and sale deed of one's right, title, and interest in land, with covenant of warranty for that interest, may be found in Smith's Leading Cases, 2 vol., p. 737; Coaky *vs.* Perry, 3 Ohio N. S., p. 344; Hanrick *vs.* Patrick, 119 U. S. R., p. 175, the substance of which we quote on pages 32 and 37 of our brief and argument, and we submit that the language of this court in the case of Hanrick *vs.* Patrick, *supra*, fully sustains all we claim, that such a deed can convey only the right or title held at the time of its execution, and if no title passed, even the receipt of the proceeds will not preclude or estop the assertion of an *after-acquired title*.

The Whipple Deeds (pp. 56–62) and the Doctrine of Adverse Possession.

On this question the counsel on the other side seems to have discovered his shiboleth. He claims that "every grant of land

is void if at the time the lands are in the actual possession of another person, claiming under a title *adverse* to that of the grantor." This is true only in the States which have adopted the Statute of 32 Henry the VIII, and I think it is not enforced in a single State or Territory, except by statutory provisions, except Massachusetts. In the case of "Livingstone *vs.* Peru Iron Co.," Senator Seward, though strongly favoring the doctrine, in his opinion, says: "It is not an elementary principle of the common law, nor in terms had it been declared by statute previous to 1830," and holds *this act* "was the true foundation of the doctrine." If correct, the doctrine cannot be enforced in the absence of a statute to sustain it.

In the case of Crarey *vs.* Goodman, (22 N. Y. R., pp. 170–177,) Seldon, in his opinion, said: "No reason exists for giving to the Champerty act a liberal or enlarged construction; it is the relic of an ancient policy, which has been treated with little favor by either legislatures or courts in modern times." If the act is so offensive in New York, certainly it would be intolorable to enforce the act of 32 Henry the VIII on a people who refuse to adopt it by statute.

But if the Champetry act were fully in force it would not *apply in this case*, because the appellees did not hold *adversely* at the time the heirs executed their deeds to appellant's grantor, S. R. Whipple, 1st, because the answer shows on its face that Amos M. Short, through whom they claim, had no title—was not at the time of his death the owner of or a *settler* on said land under the act of September 27, 1850; nor do the proofs or the findings of the court show that he was.

In view of the allegations of the alleged equitable defence of these appellees, they must be presumed to have known *at the time* they purchased and improved that they had no right or title whatever to the land.

A deed or judicial proceeding which is a *nullity* can never lay the foundation of an *adverse* possession. And if these appellees, without the deed, had no right to the possession, they secured no right by a deed or judgment given without authority. It follows that possession under their deed was not, and could not be, by *color of title* or adverse. (See Livingston *vs.* Peru Iron Co., 9

Wend., 512; Lincoln *vs.* Tower, 2 McLean, 437; Bernal *vs* Gleim, 33 Cal., 674; Jackson *vs.* Waters, 12 John. R. 365; La Froinbois *vs.* Jackson, 8 Cow. R., 583.

Therefore everything alleged in this amended answer by which appellees claim to have secured titles legal or equitable is an absolute *nullity*, hence they cannot hold by *color of title* or *adversely*, hence the whole proceeding as alleged by the answer from 1856 to 1870 was and is an absolute nullity.

Because,

I.

Amos M. Short did not own the land, nor is he alleged to be the *donee* under the act of Congress of 27 September, 1850.

II.

Because said Short never notified on, nor took said land as required by the donation law.

III.

Because the answer alleges that after the death of said Short another party, Esther Short, filed the notification with the Surveyor General showing that Amos M. Short was competent to take the same.

IV.

Because *at the time, 1856*, the alleged west half was *public land of the United States.*

V.

Because the probate court of Clarke Co., W. T., had no power, jurisdiction, or authority to make said partition.

Therefore these proceeding but render the deed executed to these appellees of the partition allotment of Grant H. Short absolutely void, and of no more value than blank paper.

The Findings as to Adverse Possession.

It is apparent that the 2d, 4th, and 5th findings of the courts below were made under the mistaken idea that Amos M. Short, at the time of his death, was a *settler* under the provisions of the donation act of 1850.

For the court holds as a conclusion of law: "1st. That the probate partition was *void* and of *no* effect," "and that thereby the legal title of the several tenants in common to an undivided interest in the whole tract of land sought to be partitioned was *not divested.*" But then proceeds to justify the admission in evidence of these *wrongful and void* proceedings, that in the light of which he could formulate an equitable estoppel, and concludes by finding, as a conclusion of law, "that the *legal title* to the land in controversy was in the *plaintiff.*" (Record, p. 20–21.

2d. Which amounts, under the ruling of this Court in Eileres *vs.* Boardman, 111 U. S., p. 356, to a *finding of fact* that the *legal title* to the land in dispute is in the appellant.

3d. This also *settles* the general claim of title by appellees, "claiming to be the *owners in fee*, and entitled to the possession of the whole of the parcel of land described in the complaint."

And now, in conclusion, should this high Court, and court of last resort, fail to agree with us as to the "total insufficiency of the allegations of the answer to constitute a defence of any description, and we see no grounds on which it can fail," yet should this Court fail us on that, and should hold that these heirs were "donees" of this "west half," on the death of Amos M. Short, then the question arises as to the total insufficiency of the alleged probate court partition proceedings to divest these heirs of their undivided interest in the whole land, and should this Court hold these proceedings were without authority and *void*, as the court below has, then, in that event, this appellant is entitled to an undivided nine-tenth interest of the land in controversy, unless this Court should (as the courts below have) formulate and establish equitable rights upon wrongful transactions well known to be absolutely void, and so held to be prior to the running of the Statute of Limitations.

LEANDOR HOLMES,
Attorney for Appellant.

1st. We claim that the equitable *answer* herein *shows upon its face* that Amos M. Short died in January, 1853, without having become a *settler* under the provisions of the act of Congress of 27th Sept., 1850; that he never took a donation claim, nor filed thereon, nor did any act while living indicating that he intended to take a donation land claim, under the law and decisions of this Court.

2d. We claim that neither his widow, nor children, or heirs, could claim any right or interest as donees under the law after his death *through him*, Amos M. Short.

3d. That their alleged Probate Court partition of this land as his *real estate*, and their bargain and sale *deeds* of these partition allotments, *prior* to their *investiture* of title, was an *absolute nullity*, and cannot *estop* them from asserting their *after-acquired title* (by virtue of anything alleged in this *answer*.)

4th. That the alleged filing of Esther Short, "in October, 1853, to cure her husband's *neglect*, and show that Amos M. Short was competent to take the same," was and is a *nullity*, and could not and did not clothe the dead Short, or any of his children or heirs, with any interest in this land, as *donees* under the law.

5th. That the issuing of the patent to these heirs in 1877 was the only act that clothed them with any right, title, or interest in or to the land, and everything they are alleged in *this answer* to have said, done, or permitted, *prior* to their *investiture* of *title*, amounts to nothing; nor can this investiture of title in 1877 relate back so as to cure and validate these *null* and *void* proceedings, because there is no act or deed of Amos M. Short or of these heirs alleged in this answer that the patent can relate back to or connect with.

6th. There are no reasons or grounds set forth, alleged, or plead, in this alleged equitable defence, on which any equities can be predicated, or on which any court of equity can afford relief. Therefore, we claim (as the Court below has held in 1885) "That this alleged equitable defence *does not display facts sufficient to constitute a defence of any description.*" (See 2 W. T. R., p. 464.)

Therefore,

We ask this Court for a reversal of the decision and judgment of the Court below, and that appellant be decreed the possession of the land in dispute.

124-495

124-495

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

PETITION FOR REHEARING

IN CASE OF

BRAZEE *v.* SCHOFIELD, No. 114.

The petition of Minnie Brazee, executrix of the estate of J. W. Brazee, for cause of rehearing, shows to this Honorable Court :

First. That on the 30th day of January, 1888, this Honorable Court rendered a decision in the above case, affirming the decision of the Court below.

Second. Your petitioner most respectfully calls attention to the fact that the Court announces a *new doctrine* in regard to the method of securing title to a Land Claim under the Donation Act of September 27, 1850, or to any of its amendments, by holding that a widow could *notify* and prove up a claim for her deceased husband who had failed, had neglected to file his *notice* while living, nor did anything showing he even desired to take said land as his Donation Land Claim. If this be correct,

it is necessarily fatal to the rights of the appellant in this action, and is contrary to the uniform ruling of the courts of the United States in regard to the Donation Act aforesaid.

Third. Permit your petitioner to further say, that a wife has no authority or power under the said Donation law to become a claimant, but is altogether dependent on the will and act of the husband as to whether she gets a claim or not. If he takes a claim under the law, the wife gets half. If her husband refuses or neglects to take a claim, the wife gets nothing. *Fitzpatrick* v. *Dubois*, 2 Saw., p. 435; *Vance* v. *Burbank*, 101 U. S., p. 521. Hence the death of the husband prior to filing his notification leaves no one with any legal relation to the land whatever.

Fourth. The rights of the widow and children are fully provided for by the law to meet just *this contingency*. For by the Act of 14th February, 1853, amendatory of the Act of 27th September, 1850, it is provided that the widow may file her notification for the same amount of land as she would have been entitled to had her husband filed his notice before death; and by another section of the Donation law the children are entitled to one hundred and sixty acres should they apply to the Surveyor General for it.

Fifth. We most respectfully submit that there is no Act of Congress, nor any prior decision of any Court, clothing a widow or any other person (under the Donation Acts aforesaid) with the authority to make or file a notification for any other person, alive or dead, *except*

that in the husband's *notification* one-half of the land goes to the wife (or to the widow, should the husband die, and his half to his children and widow equally). Hence, if it be true, as has been held heretofore, that no one can cure the neglect or omission of the husband to notify for a claim, there could be no land claim of Amos M. Short after his death to partition among his children at any time prior to their investiture of title, 13th October, 1877 ; and if this be true, these heirs of Amos M. Short could not be *estopped* from asserting their after-acquired title of 13th October, 1877 ; for neither they nor any one had any right of title prior thereto. See *Hanrick* v. *Patrick*, 119 U. S., p. 175, and all prior authorities.

Sixth. The fact is, that Amos M. Short, a year or two before his death, gave up and sold to a Dr. ——— Landsdale his possessory rights of settlement on said *alleged* Donation Claim, which deed or contract of sale is on record in the recorder's office of Clark County, Washington Territory. This fact was not known until after the trial below, and is not in the record, but can be shown to be true, as alleged, on a rehearing ; and that said Landsdale did (soon after the death of said Amos M. Short) leave said land for fear of the Hudson's Bay Company. That this sale of Amos M. Short's possessory rights before he notified on said land, and before his death, shows of itself that he had abandoned all idea of taking said land as his Donation Land Claim.

Seventh. Therefore this appellant, with all due deference to this Honorable Court, most respectfully

asks that a rehearing should be granted in this case at the next term.

MINNIE BRAZEE,
Executrix of the estate of J. W. Brazee, deceased.

PER LEANDER HOLMES,
Attorney for Appellant.

Leander Holmes, being sworn, says that he is the attorney for appellant in this petition, that he is acquainted with the matter above stated in said petition, and that he further says that he has seen and read the record of the said sale, made by "Amos M. Short," of his possessory rights in an alleged lot of land, executed before his death to one "Dr. —— Landsdale," now of Olympia, Washington Territory; that said deed is recorded in the book of records of Clark County of said Territory. That said deed of sale included the same land that "Esther Short" thereafter notified on before the Surveyor-General of "Oregon," Oct. 4th, 1853. That this affiant did not discover the fact of said sale before the case of "*Brazee* v. *Schofield*," referred to in the above petition, was filed in this court.

LEANDER HOLMES.

Subscribed and sworn to before me this 1st day of May, 1888, Chicago, Cook County, Illinois.

EUGENE M. HARTMAN,
[SEAL.] *Notary Public.*